TESTAMENTARY FREEDOM, *IUS COMMUNE* AND PARTICULAR LAW (c. 1400-1620)

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PEETERS

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INTRODUCTION

Mark VERMEER, Wouter DRUWÉ and Maciej MIKUŁA

The present volume contains a collection of papers originally presented at the conference '*Ius commune* and local testamentary succession laws and customs (c. 1400-1620)', held on 12 and 13 January 2023 at the *Collegium Maius* of the Jagiellonian University in Kraków.[1] Its organization took place under the auspices of the CELSA-project '*Ius commune* and local testamentary succession laws in the periphery of the European academic tradition. A comparative analysis of the Polish-Lithuanian Commonwealth and the Low Countries', a cooperation between KU Leuven and the Jagiellonian University.[2]

Last wills and testamentary legislation are valuable source types for interdisciplinary purposes. On the one hand, as legal documents, they were drafted according to specific requirements and within a certain regulatory framework. On the other hand, the study of the content of last wills allows for the uncovering of social changes, personal sympathies and antipathies, ties of dependence and authority, religious reforms and changes in the family model. When last wills were challenged in court, the records reflect the intentions of the various parties, the original aims of the testator, and the legal and societal norms that were (or were not) overstepped.

The chronological focus of this volume is the time frame between c. 1400 and c. 1620. This was an era of political and legal change. Throughout Europe princes sought to increase and consolidate their power and centralize legal authority.[3] Royal or princely councils and supreme courts were founded to act *inter alia* as appellate courts, allowing subjects to lodge appeals against verdicts pronounced by local authorities. The fifteenth and sixteenth centuries saw attempts to codify and homologize local customary laws, ostensibly to facilitate legal practice, but also to increase the princes' grasp on the matter. The geographical scope of the volume is broad and includes (Christian) Europe. The emphasis of the CELSA-project, however, is on what from the perspective of academic legal culture could be interpreted as the 'peripheral' regions. These include the Kingdom of Poland and the Grand

[1] The editors, as organizers of the conference, wish to convey their gratitude to dr. Kamil Sorka and drs. Paweł Kaźmierski for their invaluable help with the conference's logistics.

[2] CELSA is an abbreviation for Central Europe Leuven Strategic Alliance. The project carries the reference 3H210350.

[3] R. LESAFFER, *European Legal History. A Cultural and Political Perspective*, tr. J. ARRIENS, Cambridge, 2018, p. 320-326 and 361-365.

Duchy of Lithuania, the Lands of the Bohemian Crown, the Low Countries, and German lands such as Saxony and Brandenburg. While the impact of legal scholars in these areas on the development of *ius commune* was not as great as that of Italian and French jurists, in all these regions universities existed where law was intensively studied and practiced.

A major theme of the volume is testamentary freedom and the various factors that restricted it. Already in Roman law a testator did not have an unlimited freedom to dispose of his property as he deemed best. A specified portion of the estate was reserved for the heirs that could not be touched upon, the legitim or *portio legitima*. Related concepts that protected the position of the heirs were the *quarta Falcidia* and the *quarta Trebellianica*, respectively limiting the portion of the estate to be disposed of in bequests, and limiting the portion that could be left to a beneficiary under a *fideicommissum*.[4]

On a different level, testamentary freedom could be curbed through regulations and legislation on the prerequisites of the last will as a legal document. Roman law prescribed very strict formal conditions for last wills to adhere to. The institution of one or more heirs was exigent ('*caput et fundamentum totius testamenti*'),[5] and the disinheritance of heirs needed to be explicitly and individually mentioned. Any omissions in these elements would nullify the will. As for the number of last wills, Roman law acknowledged only one valid last will at a time: the writing of a new will *ipso facto* invalidated the previous. No such limit was set for codicils, but the new last will needed to acknowledge all codicils for them to retain their validity. With only one valid will in existence, the disposition had to include the full estate. The Roman could not die *partim intestatus*. The probative force was also subject to strict regulations. Seven witnesses had to be present; five were needed to create a codicil. If the amount of witnesses fell below that number, *i.e.* following the death of one of them, the will was declared invalid.[6]

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[4] On the *lex Falcidia*, the *senatusconsultum Pegasianum* and the *senatusconsultum Trebellianum*, see recently: D. Schanbacher, "Beschränkungen der Testierfreiheit (*lex Falcidia* und *SC Pegasianum*)" ["Limits of Testamentary Freedom (*lex Falcidia* and *SC Pegasianum*)"], in: U. Babusiaux *et al.* (*eds.*), *Handbuch des römischen Privatrechts* [*Handbook of Roman Private Law*], Tübingen, 2023, p. 2725-2771.

[5] Gaius 2,229; Inst. 2,20,34. See: T. Rüfner, "Das *testamentum per aes et libram* und andere Formen letztwilliger Verfügungen" ["The Last Will *per aes et libram* and Other Forms of Acts of Last Will"], in: U. Babusiaux *et al.* (*eds.*), *Handbuch des römischen Privatrechts* [*Handbook of Roman Private Law*], Tübingen, 2023, p. 534; R. Świrgoń-Skok, "Heredis institutio caput et fundamentum totius testamenti est – as a rule of Roman inheritance law", *Krytyka Prawa* [*Criticisms of Law*] 8 (2016), nr. 2, p. 157-172; M. Kaser, *Das römische Privatrecht. Erster Abschnitt. Das altrömische, das vorklassische und klassische Recht* [*Roman Private Law. First Section. Old Roman, Preclassical and Classical Law*], Munich, 1955, p. 571-572, §161.

[6] T. Rüfner, "Das *testamentum*", p. 543-548; M. Kaser, *Das römische Privatrecht. Erster Abschnitt*, p. 568, §160. Idem, *Das Römische Privatrecht. Zweiter Abschnitt. Die nachklassische Entwicklungen*, Munich, 1959, 342-343, §283.

In comparison, canon law was much more indulgent. Referring to the Biblical passage '*in ore duorum vel trium testium stabit omne verbum*' (2 Cor. 13), only two witnesses and a priest – who also acted as scribe – were necessary to create a valid last will.[7] Most of the Roman formalities were discarded as well. The institution of an heir was no longer required, nor was the disinheritance of the *ab intestato* heirs ('*sui heredes*'). Multiple wills could simultaneously exist, with each disposing of a part of the estate. Such flexibility and the aim to have as many last wills as possible declared valid might have been prompted by a more practical goal: most last wills tended to include donations *ad pias causas* to the Church or local ecclesiastical institutions.

Thus, *ius commune* in itself presented conflicting rules for drafting last wills. Customary law added to the complexity, not in the least due to the unfamiliarity with the concept of last wills. The notion that one could dispose of one's property after death was quintessentially Roman. On a national or regional level, royal, princely, or episcopal legislation led to a further multitude of legal norms, as they imposed additional limitations to testamentary freedom.

Despite the importance of testamentary law and its ubiquity throughout Europe, few studies have been dedicated to the history of last wills in a comparative and interdisciplinary perspective. Noteworthy is the multi-volume *Actes à cause de mort* in the series of the Société Jean Bodin, of which the second and third volumes are dedicated to premodern (and modern) Europe.[8] More recently, a volume in the *Studies in the History of Law and Justice* has been dedicated to succession law in pre-modern and modern Europe, in which many contributions address the role of *ius commune*.[9] The scope of this present volume is different, as it has more strict chronological demarcations and an emphasis on the position of learned law.

Structure

The volume is divided in three thematical parts. Within each part, the contributions have been listed in a chronological order. In each part, the contributions discuss different geographical regions, allowing for a broader and comparative view of the general theme.

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7 X. 3.26.11. J. A. Brundage, *Medieval Canon Law*, London, New York, 1995, p. 143. R. H. Helmholz, *The Spirit of Classical Canon Law*, Athens, 1996, p. 156-157.

8 L. Waelkens (*ed.*), *L'acte à cause de mort II-III: Europe médiévale et moderne = Acts of Last Will II-III: Medieval and Modern Europe* [Recueils de la Société Jean Bodin pour l'histoire comparative des institutions, 60-61], Brussels, 1993.

9 M. Gigliola di Renzo Villata (*ed.*), *Succession Law, Practice and Society in Europe across the Centuries* [Studies in the History of Law and Justice, 14], Cham, 2018.

Part 1 discusses testamentary practice as a lens for studying social life, a highly interdisciplinary outlook. Drawing up a last will was not just an act of a legal nature: it also took place in a social context. Different social groups held different attitudes towards the last will and the choice to put one's last will to writing depended on the socio-economic environment the testator lived in. As in last wills testators enjoy a much greater freedom than in legal acts of other natures, they are valuable sources for the study of social relationships and societal norms. **Chanelle Delameilleure** takes us to the preceding stage of will making: the negotiation of marriage gifts and future shares in the inheritance. In the Low Countries children of both sexes enjoyed equal shares in the inheritance. Parents, especially those from the artisan and upper classes, often struggled to maintain the familial wealth and ensure its survival – and preferably growth – for the next generations. As Delameilleure shows through careful study of fifteenth-century contracts recorded by the aldermen of three cities in the Low Countries, Antwerp and Leuven in Brabant, and Ghent in Flanders, families resorted to contracts and agreements in which limitations were set to the children's choice of marriage. Consent of family members was needed for (re)marriage, and the position of children as heirs was subject to conditions. Most cases concerned daughters, as they were deemed more vulnerable to abduction, but sons were not excluded from such arrangements. Disinheriting was a possible sanction for a child unwilling to uphold the agreement, albeit one enforced only rarely. **Agnieszka Bartoszewicz** describes how peasants in the Polish countryside found access to the last will. Combatting the common image of countryside dwellers, the Polish peasantry formed part of a well-connected network and was well aware of the legal and administrative opportunities that cities had to offer. They approached both church officials and municipal personnel, as these possessed the practical skills to draw up wills and because their books were considered *loca credibilia* that enhanced the probative force of the documents. Municipal authorities are also the producers of last wills in **Marta Knajp**'s contribution. From the town of Lviv, in present-day Ukraine, no less than four registers containing last wills for the second half of the sixteenth century have survived, a veritable treasure trove. Knajp studied those wills that importantly deviated from the law of intestate succession, specifically the arguments brought forward to legitimize this deviation. She comes to the conclusion that choice of words was not just governed by formularies, but reflected actual social relations and tensions. Praise for their spouse, laments on their partner's maltreatment, or complaints about an ungrateful child were included as reasons why the portion prescribed by the law of intestate succession was not respected.

In part 2, emphasis is placed on the legal tradition as taught and practiced at European universities. For jurists, *ius commune* was not just a scholarly exercise; they applied the knowledge and arguments to contemporary legal practice. Apart from Roman and canon law, they also had to take into account local laws and customs. Did these supersede learned law, or were they subjected to it? **Wouter Druwé** discusses a set of *consilia*, or legal advices, written by the fifteenth-century Leuven

law professors Robertus de Lacu and Nicolaas Everaerts on specific cases. These experts had repeatedly assisted in matters testamentary, and regularly advocated a high degree of testamentary freedom, taking their arguments not solely from *ius commune*, but also from local laws and ordinances. **Marvin Wiegand** introduces us to fifteenth- and sixteenth-century Frisia, a peripheral region where a complete absence of overlordship had led to a unique absence of a centrally imposed legal system. Legal scholarship and practice were thus highly similar. Various legal corpora are known, showing varying degrees of Roman and canonical influence. Testators found themselves caught between the strict Roman last will, considered the highest attainable standard, the Roman codicil, and the more relaxed requirements set by canon law, which were easier to fulfil. The difference in number of witnesses is taken as example in this contribution. Wiegand concludes that Frisians often settled on middle ground, hoping that their last will would be valid according to at least one of the legal norms. The differences between Roman law and canon law formed subject of a specific genre of legal writing since the Middle Ages: the *differentiae iuris civilis et canonici*. In his contribution, **Piotr Alexandrowicz** addresses the *differentiae* by two sixteenth-century German jurists, Johann Emerich von Rosbach and Konrad Rittershausen, on the topic of the *quarta Trebellianica*. According to Roman law, the heir *ab intestato* was entitled only to this *quarta*; in canon law an additional quarter was granted on the basis of natural law. Alexandrowicz shows how the *differentiae* served as compendia for the application of legal provisions. They thus did not shape new legal thought, but sketched the past and present discourse.

The last part discusses the position of testamentary freedom in particular law (*ius particulare*). In premodern Europe, certain groups had their own laws and privileges. The uniqueness of such groups was based upon elements such as economy (*e.g.* miners), geography (*e.g.* city dwellers, inhabitants of a specific diocese), or class (*e.g.* academics). Since such characteristics could overlap, this meant that these groups were subject to concurrent legal systems. What did this entail for legal practice? **Adrian Schmidt-Recla** discusses a volume containing nearly 1.400 sentences and *consilia* from the Leipzig city aldermen in the sixteenth century. The argumentation found in these sentences was taken from both *ius commune* and particular law. The latter, based on the *Sachsenspiegel* and Magdeburg law, did not address testamentary matters, leaving the aldermen to employ *ius commune* to fill in these lacunae. Their attempts were not restricted to legal practice in Leipzig alone. Several Leipzig aldermen were employed by the elector of Saxony to develop a new codification of Saxon law, which materialized in the 1572 *Kursächsische Konstitutionen*, in force in Saxony until the nineteenth century. **Marek Starý** presents a synthesis of research on testamentary law in sixteenth-century Bohemia. Here the multitude of legal codes was even greater: one encountered land law, aristocratic law, multiple types of municipal law, and seigneurial law. He discusses several types of limitation, present throughout the various legal systems, that restricted testamentary freedom. The existence of undivided family property ('*nedíl*')

impeded the free disposition of (part of) this property by one of the individual family members. Typical of Bohemian testamentary law was also the impossibility for noble families to draw up a last will without royal consent. As this acquisition made them dependent on the sovereign, several legal constructions were invented to circumvent this. Highly original and popular was a construction that involved the testator taking a redeemable mortgage from his intended heir with his estate as collateral. If he failed to redeem the (fictitious) debt, after his death his goods would devolve unto the creditor. Lastly, the contribution of **Maciej Mikuła** studies a register of last wills of seventeenth- and eighteenth-century professors from the University of Kraków. As members of the academical community, professors were under the jurisdiction of the rector of the university. At the same time – depending on their social status as well as the location of their immovables – they could be subject to land law, municipal law, and canon law as well. Each of these systems imposed limitations on the testamentary freedom. Matters pertaining to the execution of the wills, such as conflicts between creditors of the deceased and the executors of the latter's will, were settled in the rector's court.

The list of contributions above thus illustrates on the one hand the multifaceted and diverse nature of the subject and on the other hand the ubiquity in late medieval and early modern Europe, in the knowledge that a complete survey is an unfeasible aim. The editors can therefore only hope that any omissions and lacunae will serve as an invitation for further research.

Further reading

The following titles are recommended for the reader whose interest is sparked by this volume.

Bartoszewicz, A., *Urban Literacy in Late Medieval Poland* [Utrecht Studies in Medieval Literacy, 39], Turnhout, 2017.

Cappon, C. M., *De opkomst van het testament in het Sticht Utrecht* [*The Rise of the Last Will in the Sticht Utrecht*], Deventer, 1992.

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Jansen, N., "Testamentary Formalities in Early Modern Europe", in: K. G. C. Reid, M. J. de Waal and R. Zimmermann (*eds.*), *Comparative Succession Law: Volume I: Testamentary Formalities*, Oxford, 2011, p. 27-50.

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KORPIOLA, M., and A. LAHTINEN (*eds.*), *Planning for Death. Wills and Death-Related Property Arrangements in Europe, 1200-1600* [Medieval Law and its Practice, 23], Boston, Leiden, 2018.

LANDAU, P. "Die Testierfreiheit in der Geschichte des deutschen Rechts im späten Mittelalter und in der frühen Neuzeit" ["Testamentary Freedom in the History of German Law in the Late Middle Ages and Early Modern Times"], *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Germanistische Abteilung* [*Journal of the Savigny Foundation for Legal History: Germanistic Section*] 114 (1997), p. 56-73.

MIKUŁA, M., "Tradycje prawne w regulacjach testamentowych w miastach Królestwa Polskiego XIV-XVI wieku: prawo sasko-magdeburskie, prawo kanoniczne i rzymskie oraz prawodawstwo lokalne" ["Legal Traditions in Testamentary Regulations in the Cities of the Kingdom of Poland in the 14th-16th Centuries: Saxon-Magdeburg Law, Canon and Roman Law, and Local Legislation"], *Kwartalnik Historii Kultury Materialnej* [*The Quarterly of the History of Material Culture*] 68 (2020), p. 131-158.

MOL, J. A. (*ed.*), *Zorgen voor zekerheid. Studies over Friese testamenten in de vijftiende en zestiende eeuw* [*Caring for Certainty. Studies on Frisian Last Wills in the Fifteenth and Sixteenth Centuries*], Leeuwarden, 1994.

MOSTERT, M., and A. ADAMSKA (*eds.*), *Uses of the Written Word in Medieval Towns. Medieval Urban Literacy II*, [Utrecht Studies in Medieval Literacy, 28], Turnhout, 2014.

OWEN HUGHES, D., "Struttura familiare e sistemi di successione ereditaria nei testamenti dell' Europa medievale" ["Family Structure and Inheritance Systems in Medieval European testaments"], *Quaderni storici. Famiglia e comunità* [*Historical Notes. Family and Community*], vol. 11, 33 (1976), p. 929-952.

REID, K. G. C., M. J. DE WAAL and R. ZIMMERMANN (*eds.*), *Exploring the Law of Succession: Studies National, Historical and Comparative* [Edinburgh Studies in Law, 5], Edinburgh, 2007.

RIGAUDEAU, S., *Le testament en droit canonique du XIIe au XVe siècle* [*The Last Will in Canon Law from the 12th to the 15th Centuries*], Bayonne, 2021.

RØNNING, O.-A., H. MØLLER SIGH and H. VOGT (*eds.*), *Donations, Inheritance and Property in the Nordic and Western World from Late Antiquity until Today* [Routledge Studies in Cultural History, 50], London, New York, 2017.

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WYSMUŁEK, J, *History of Wills, Testators and Their Families in Late Medieval Kraków. Tools of Power* [Later Medieval Europe, 23], Leiden, Boston, 2020.

PART I

TESTAMENTARY PRACTICE AS A LENS FOR STUDYING SOCIAL LIFE

PRACTICING PARTIBLE INHERITANCE IN LATE MEDIEVAL FLANDERS AND BRABANT

Chanelle DELAMEILLIEURE

ABSTRACT – Inheritance law was remarkably egalitarian in the many regions of the late medieval Low Countries. All children from a marriage inherited an equal portion of their parents' property, regardless of age or sex. This feature of Low Countries' inheritance law has been often proposed as one of the key factors that would have loosened the bonds of patriarchy in this region. This paper examines how families dealt with this principle and if, and how, they tried to navigate the risks rebellious children could pose. In particular, it will focus on records of voluntary jurisdiction from different cities in the fifteenth-century duchy of Brabant and county of Flanders. These records contain various contracts and agreements among family members, and particularly between parents and their offspring, in which terms and conditions regarding marriage gifts and inheritance were negotiated. These contracts show that, although partible inheritance mattered and was a crucial principle in late medieval Brabantine cities, families tried to hedge against financial risks and managed to bend the law slightly.

1. Introduction

In 1483, Gillis De Hamere had abducted Elisabeth Vanden Huffele in the city of Ghent.[1] A record of voluntary jurisdiction registered after the abduction shows the tense relationship between the abductor/abductee and their families. Elisabeth's father, Martin Vanden Huffele, was not willing to simply accept Gillis as his son-in-law. He threatened to bring the case to court and – in accordance with urban law – disinherit his daughter who, according to the records, had followed Gillis by consenting to marry him.[2] To prevent Elisabeth's father from pressing charges, Gillis' parents gave their son a large amount of goods with the consent of Gillis' siblings. According to the record, the parents acted 'out of necessity and because of

[1] Ghent, City Archives (henceforth: CAG), series no. 301, no. 57, fol. 36r (31 October 1438) and fol. 58v (4 November 1438).

[2] About anti-abduction laws in the Low Countries, see M. GREILSAMMER, "Rapts de séduction et rapts violents en Flandre et en Brabant à la fin du Moyen-Âge" ["Seduction and Abduction in Flanders and Brabant in the Late Middle Ages"], *The Legal History Review* 56 (1988), p. 41-84.

Elisabeth's desperate request for help' so that Elisabeth's father 'agreed with the aforementioned peace and [that] he would not take matters to court'.[3] Relatives of rapists or abductors, when hoping to prevent prosecution, typically promised to provide the new couple with a large wedding gift in order to make their son a more attractive spouse and facilitate a marriage between perpetrator and victim.[4] This case shows that the abductee, Elisabeth, became an ally of the abductor and his family after being abducted by Gillis, asking them for help to prevent her disinheritance. A later contract about this case informs us that the large wedding gift Gillis and Elisabeth had received from Gillis' parents had caused a serious imbalance in the abductor's family. Because of the post-abduction settlement, Gillis had received far more property than his siblings. As this violated the principle of equal inheritance – which had a central position in Ghent customary law – , Elisabeth and Gillis later renounced part of the gift they had received at the time of their marriage.[5] In this case, the abductor's family went beyond expectation in order to satisfy Elisabeth's father. Afterwards, however, Elisabeth and her husband worked out a new, more reasonable arrangement with Gillis' parents.

This case from late medieval Ghent raises questions about the dynamics between children and parents in negotiating marriage and the transfer of family property. The interactions between Elisabeth, Gillis and their parents are remarkable as they display children's rights – an arrangement regarding Gillis parents' estate was made – while at the same time exposing the authority of parents – Martin threatened to disinherit his daughter for marrying against his wishes. This case therefore lays bare a paradox in current scholarship: while a large body of studies suggests that ties of generational and age-related authority had loosened in the late Middle Ages, some of the evidence indicates that parental control over their offspring tightened as the Middle Ages drew to a close. This paper examines these tensions as it studies how families navigated situations in which their patrimonial aspirations were liable to be pushed aside by their children's 'reckless' behaviour in fifteenth-century Flanders and Brabant, two densely urbanised and highly commercial regions in the Low Countries.[6]

According to recent hypotheses, young people and women had more freedom to make life choices independently from patriarchal family structures in the Low

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3 CAG, series no. 301, no. 57, fol. 58v (4 November 1483): '*ter neerenster beede ende begheerde vanden vornoemde Lijsbette […] ten appetite ende ghelieften vanden vornoemde Martine haren vadere zoude hij gheaccordert hebben inden vorscreven paeys ende achterhouden vanden vorster wettelichede*'.

4 M. Danneel, *Weduwen en wezen in laat-middeleeuws Gent* [*Widows and Orphans in Late Medieval Ghent*], Leuven, 1995, p. 171-172.

5 P. Godding, *Le droit privé dans les Pays-Bas méridionaux du 12e au 18e siècle* [*Private Law in the Southern Low Countries from the 12th to the 18th Centuries*], Brussels, 1987, p. 409.

6 B. Blondé, M. Boone and A. Van Bruaene (*eds*.), *City and Society in the Low Countries, 1100-1600*, Cambridge, 2018; A. Bardyn, "Women in the medieval society", in: V. Lambert and P. Stabel (*eds*.), *Golden Times. Wealth and Status in the Middle Ages in the Southern Low Countries,* Tielt, 2016, p. 283-317.

Countries than their counterparts in other European regions.[7] Therefore, this region is an interesting one to study when examining the tension between young people's ability to make their own choices and parents' desire to protect family property. This chapter focuses on three cities, namely Ghent (Flanders) and Antwerp and Leuven (Brabant) through a study of aldermen registers which contain records of voluntary jurisdiction that reveal private arrangements made within families about marriage and inheritance. While Leuven was a mid-sized city in economic decline, Antwerp entered into a phase of exponential economic growth as it would soon grow into the most important European commercial centre. Although in economic stagnation, Ghent remained one of the Low Countries' largest cities with approximately 50.000 inhabitants in the fifteenth century.[8] Despite differences in local inheritance and marriage law, all three cities were characterised by a system of partible inheritance; each child, regardless of age or sex, received an equal portion of their parents' estate. Moreover, all three cities' archives contain evidence that shows that the tension between strategic views on marriage making and canon law's focus on consent was present and regularly led to conflicts within families. After further discussing inheritance law and local laws on marriage making in the cities under scrutiny, several contracts will be studied that show how parents tried to prevent their kids from marrying poorly or spending their property recklessly. A final section about disinheritance examines if and how parents were able to manoeuvre their way around the principle of equal inheritance.

2. Inheritance, marriage and generational dynamics

In the Low Countries, each child received an equal share of their parents' estate according to inheritance law. Children often received a part of this inheritance upon marriage; part of the family property was then transferred to a new household.[9] Each marriage could thus jeopardize a family's property as parents lost control over (a part of) the inheritance young people took with them when forming their own

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7 J. Luiten Van Zanden, T. De Moor and M. Carmichael, *Capital Women: The European Marriage Pattern, Female Empowerment and Economic Development in Western Europe 1300-1800*, Oxford, 2019.

8 R. Van Uytven, *Stadsfinanciën en stadsekonomie te Leuven van de XII^e tot het einde der XVI^e eeuw* [*City Finances and the Urban Economy in Leuven from the 12^th to the End of the 16^th Century*], Brussels, 1961, p. 474-478, specifically 478; P. M. Klep, *Bevolking en arbeid in transformatie: een onderzoek naar de ontwikkelingen in Brabant, 1700-1900* [*Population and Labour in Transformation: An Examination into the Developments in Brabant, 1700-1900*], Nijmegen, 1981; J. Van Roey, "De bevolking" ["The Population"], *Antwerpen in de XVI^de eeuw* [*Antwerp in the 16^th Century*], Antwerp, 1976, p. 95-108; H. Soly, "De groei van een metropool" ["The Growth of a Metropolis"], in: K. Van Isacker and R. Van Uytven (*eds.*), *Antwerpen: twaalf eeuwen geschiedenis en cultuur* [*Antwerp: Twelve Centuries of History and Culture*], Antwerp, 1986, p. 85-86.

9 M. Danneel, "Orphanhood and Marriage in Fifteenth-century Ghent", in: W. Prevenier (*ed.*), *Marriage and Social Mobility in the Late Middle Ages*, Ghent, 1989, p. 123-139.

households.[10] A thoughtful choice of spouse was therefore essential but not a given. After all, parents theoretically had no say in their children's marriage as canon law clearly stated that it was the consent of the bride and groom that made a marriage, not the consent of their parents and relatives.[11] Canon law's focus on consent, however, was very much at odds with customary practice according to which marriages were first and foremost family affairs. The combination of egalitarian property laws, canon law's individualist approach to marriage and the expansion of labour markets would have undermined familial authority and empowered youths to make independent choices in the late medieval Europe. These changes would have significantly softened the once-harsh relationships between generations; young people could spend the adolescent years away from the family home in service or learning a craft, become financially independent, choose their own spouse or decide not to marry at all.[12] According to recent hypothesis, this pattern grew especially strong in the Low Countries as according to the law in this region, all children that were born from the same marriage inherited an equal portion of their parents' estate in Leuven, Antwerp and Ghent, regardless of their age or sex.

As said above, an advance on the inheritance portion was often given as a marriage gift. It was only an advance because this gift could not override the principle of equal inheritance. Therefore, this gift had to be calculated into the recipient's portion when the inheritance was divided after the death of (one of) the parents. There were two ways to do this. The child who had received the advance could retain the property which he or she had received at marriage, but was then excluded from any further inheritance. The amount of the marriage gift could also be calculated into the total amount of the parental property, to make sure that every child received a similar portion of the inheritance. In the second option, the total estate was revalued and equally divided among all the children. By giving an advance when a child married, parents were supporting their children as they set up their own households. The customs of many Flemish and Brabantine cities, noted down in the sixteenth century, put a lot of emphasis on the fact that parents should treat their children equally, 'because one cannot make one cherished child' ('*men mach gheen lief kindt maken*'). This principle is attested from the end of the twelfth century.[13]

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10 Suggested in C. Donahue, *Law, Marriage, and Society in the Later Middle Ages: Arguments about Marriage in Five Courts*, Cambridge, 2007, p. 615.

11 P. Reynolds, *How Marriage became one of the Sacraments: The Sacramental Theology of Marriage from Its Medieval Origins to the Council of Trent*, Cambridge, 2016.

12 J. Bolton, "'The World Upside Down': Plague as an Agent for Social and Economic Change", in: M. Omrod and P. Lindley, *The Black Death in England*, Stamford, 1996, p. 17-78; J. Luiten Van Zanden, T. De Moor and M. Carmichael, *Capital Women*; J. Goldberg, "Migration, Youth and Gender in Later Medieval England", in: J. Goldberg and F. Riddy (*eds.*), *Youth in the Middle Ages*. Rochester, 2004, p. 85-99; D. W. Lightfoot, *Women, Dowries and Agency: Marriage in Fifteenth-century Valencia*, Manchester, 2013.

13 P. Godding, *Le droit privé*, p. 409.

Yet, we know that people in the past had instruments to deviate from the customary provisions; last wills could be used to alter the control over property. Through last wills, parents could shape their child's future. The law, however, demarcated the room people had to manoeuvre inheritance laws. There was a lot of variety in the extent to which people could freely dispose of their property in the Low Countries.[14] Generally speaking, testamentary powers were restricted more severely in Flanders than they were in Brabant. In Ghent and by extension in Flanders, individuals could only use their testamentary powers for one third of their estate, while the other two third had to be divided in accordance with existing property and inheritance laws. Children were entitled to an equal share, something which a testament could not interfere with according to the law. Brabant, on the contrary, was characterized by a higher degree of testamentary freedom. In theory, Brabantine testators had the right to dispose of their estate freely, not having to follow customary rules of succession. Evidence from late medieval practice, however, shows that within Brabant, there were nevertheless local statutes and sentences being issued which aimed to ensure that succession laws were respected. Studying customary laws in sixteenth-century Antwerp, legal historian Kaat Capelle showed that parents' 'testamentary powers were severely restricted'.[15] Authorities in Mechelen issued several verdicts that had to guarantee that parents would not deprive their children of a part of their estate and in Brussels too, local ordinances limited the testamentary freedom that prevailed in Brabant.[16] Yet, records from legal practice clearly show that people in Brabant were less restricted by succession laws than people in Flanders.

Despite the testamentary freedom in Leuven or ability of parents in Antwerp and Ghent to dispose of parts of their goods as they pleased, giving each child a fair, preferably equal portion of the family estate was a custom that was deeply entrenched in late medieval Flemish and Brabantine urban societies. Depriving children of their rights to (parts of) the family estate was considered an extreme decision. Contemporary legal texts indicate that proceeding to such a harsh measure required a sound motivation. After all, depriving people of their access to family property was contrary to the egalitarian ideology that prevailed in many cities in the late medieval Low Countries.[17] This region was highly commercialized and the urban economies were centered around the nuclear household. After marriage, men

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14 P. GODDING, "Dans quelle mesure pouvait-on disposer de ses biens par testament dans les anciens Pays-Bas méridionaux?" ["To What Extent Could One Dispose of One's Goods by Last Will in the Ancient Southern Low Countries?"], *The Legal History Review* 50 (1982), p. 279-296.

15 K. CAPELLE, "Law, Wives and the Marital Economy: Antwerp", in: A. BELLAVITIS and B. Z. MICHELLETTO (*eds.*), *Gender, Law and Economic Well-being in Europe from the Fifteenth to the Nineteenth Century. North versus South?*, London, 2018, p. 234-235.

16 P. GODDING, "Dans quelle mesure", p. 285, note 29.

17 In Ghent, Antwerp and Leuven equal inheritance prevailed, giving all children regardless age or sex an equal portion of their parents' estate. In other Low Countries' cities like Nivelles, for example, daughters were excluded when competing with their brothers. When talking about women's position in the Low Countries, historians typically point at the system of equal inheritance but they largely

and women from upper and middling artisan and merchant families moved out of their parental home and started their own nuclear households and businesses that were centered around those households. Both spouses brought with them skills, knowledge and property. This was essential to make their freshly-founded households economically viable and profitable. Social and economic historians have detected a high degree of intermarriage within professional groups; for example, clothmakers' daughters married clothmakers' sons as boys and girls in the Low Countries from a young age learned skills that they would later need when managing their own household business.[18] Cultural studies on fatherhood and intergenerational relations too show that one of the core tasks of parents was to raise children into independent individuals who could successfully assume their roles as husband, wife, tradesman etc. in society. Families wanted to set their children up for success and providing them with training and assets was crucial to obtain that objective.[19] The upper and middling social groups (consisting of masters, artisans, laborers, shop keepers and petty merchants) were demographically dominant and politically, economically and culturally significant in the cities under scrutiny, which indicates that these beliefs were deeply entrenched in the social fabric of urban life.[20]

In late medieval societies, family unity was a significant source of honour.[21] Excluding a child from inheriting entailed a breach of family unity, and therefore this was considered an extremely harsh measure which should only be employed under exceptional circumstances. However, children could also damage family honour by acting against the social and patrimonial interests of the family. Historical scholarship traditionally points at marriage as one of the key factors that potentially created tension between generations.[22] Criminal records in the Low Countries

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overlook the fact that other Low Countries cities did not fit within that picture. See P. Godding, *Le droit privé*, p. 408-411.

18 M. Howell, "The Social Logic of the Marital Household in Cities of the Late Medieval Low Countries", in: M. Carlier and T. Soens (*eds*.), *The Household in Late Medieval Cities. Italy and North-Western Europe compared*, Leuven, 2001, p. 194; C. De Backer, *Farmacie te Gent in de Late Middeleeuwen* [*Pharmacy in Ghent in the Late Middle Ages*], Hilversum, 1990, p. 68-69; H. Van Werveke, "De Gentse vleeshouwers onder het oud regime. Demografische studie van een erfelijk ambachtsgild" ["The Ghent butchers in the Ancien Regime. Demographic study of a hereditary craft"], *Handelingen der Maatschappij voor Geschiedenis en Oudheidkunde te Gent* [*Acts of the Society for History and Antiquarianism in Ghent*] 3 (1948), p. 19-21.

19 R. Moss, *Fatherhood and its Representations in Middle English Texts*, Suffolk, 2013; L. Laumonier, "Meanings of Fatherhood in Late Medieval Montpellier: Love, Care and the Exercise of Patria Potestas", *Gender & History*, 2015 (27), p. 651-668.

20 B. Blondé, M. Boone and A. Van Bruaene (*eds*.), *City and Society in the Low Countries, 1100-1600*, Cambridge, 2018.

21 T. Courtney, "'The Honour & Credite of the Whole House': Family Unity and Honour in Early Modern England". *Cultural and Social History* 10 (2013), p. 329-345.

22 See for example: B. Bandlien, "The Church's Teaching on Women's Consent: A Threat to Parents and Society in Medieval Norway and Iceland?", in: L. Hansen (*ed*.), *Family, Marriage, and Property Devolution in the Middle Ages*, Tromso, 2000, 55-79; C. Christensen-Nugues, "Parental Authority and Freedom of Choice: the Debate on Clandestinity and Parental Consent at the Council of Trent (1545-63)", *Sixteenth Century Journal* 45 (2014), p. 51-72; A. Finch, "Parental Authority and

abound with examples of conflicts between generations arising after marriage. For example, in 1500 in Antwerp, a girl named Woyeken Hagen eloped with a man named Symon. Her parents went to the local bailiff to complain about their daughter's abduction. When finding the couple, Woyeken declared to the bailiff that 'she did not want any other man than him' and that she ran away because she did not want to marry the 'ugly bearded man' her relatives had selected for her.[23] In Ghent, Jehan van Leefvelt was punished by local authorities on 16 September 1436 for seducing a young girl. He bombarded her with beautiful words, even offering her jewelry to convince her to marry him against her family's wishes.[24] In 1419, Ydeke Roenvox's father complained to the local bailiff after his daughter had run off to a nearby village to marry Hendrik Van Calsteren against the former's will.[25] Cases like these indicate that the choice of spouse could be a factor of intense tension and stress between generations within the family.[26]

One legitimate reason for disinheritance put forward in several urban law texts in many Low Countries' cities was for minors to be marrying against their parents' wishes. This is notable because marriage was, as said earlier, an ecclesiastical and not a secular competency and canon law did not require parental approval for marriage making. It put forward the age of twelve for girls and fourteen for boys as age of consent. Flemish and Brabantine customary laws, on the contrary, required the consent of parents when a minor would get married. The secular age of majority in the three cities under scrutiny was twenty-five. Custom thus contradicted canon law as it did not allow teenagers between twelve (or fourteen for boys) and twenty-five to consent to a marriage without involving their families. Therefore, as a counterreaction to canon law's emphasis on individual consent, secular authorities tried to increase the parents' scope of opportunity to influence their offspring's choice of spouse by issuing local statutes and ordinances that criminalized abductions with marital intent and marriages of minors not approved of by relatives.

Indeed, many ordinances issued by city authorities as well as sovereign lords stipulated that women who married without consulting their relatives ought to be disinherited. For example, already in the thirteenth century, Margaret of Constantinople issued an ordinance for the city of Ghent declaring that women who married

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the Problem of Clandestine Marriage in the Later Middle Ages", *Law and History Review* 8 (1990), p. 189; J. GOLDBERG, "The Right to Choose: Women, Consent and Marriage in Late Medieval England", *History Today* 58 (2008), 16-21.

23 Brussels, State Archives, Chamber of Auditors of Brabant (henceforth: SAB, CAB), no. 12904, fol. 270rv.

24 CAG, series no. 212, fol. 226r.

25 SAB, CAB, no. 12654, fol. 209r; City Archives Leuven, Old Archives (henceforth: SAL, OA), no. 584, fol. 125r.

26 About the ways in which historians have tackled this debate, see S. MCSHEFFREY, "'I Will Never Have None against my Father's Will': Consent and the Making of Marriage in the Late Medieval Diocese of London", in: J. T. ROSENTHAL and C. M. ROUSSEAU (*eds*.), *Women, Marriage, and Family in Medieval Christendom: Essays in Memory of Michael M. Sheehan*, Kalamazoo, 1998, p. 153-174.

against their parents' wishes should be disinherited 'as if they were dead', a penalty that was repeated in the charter issued by count Guy of Flanders in 1297, by Ghent's city governors in 1438 and by duke Philip the Good in 1438.[27] In Brabant too, the penalty of disinheritance pops up in the Joyous Entry charters issued for the duchy of Brabant. These texts were promulgated by the Brabantine dukes at the start of their reigns and acknowledged and confirmed the rights and duties of the people of Brabant. These lengthy charters always contain articles on abduction with marital intent and seduction and include that minors marrying against their parents' wishes should be disinherited.[28]

The penalty of disinheritance for disobedient daughters occurs in legal sources across premodern Europe. Despite these many legal norms, however, historians have noted that judges did not really apply the penalty of disinheritance as it was far too extreme.[29] Canonists expressed their disapproval of parents disinheriting their children for marrying against their wishes, which further indicates that this penalty was considered a disproportionately harsh one.[30] Therefore, scholarship tends to describe parents as relatively powerless when children married against their wishes; such marriages were valid and unbreakable and evidence shows that parents generally reconciled with their rebellious children and accepted that marriage that could not be made undone.[31] A closer look at private contracts in the aldermen registers of voluntary jurisdiction, however, shows a more nuanced reality.

3. Making inheriting conditional

The registers of voluntary jurisdiction of the Low Countries' cities show that families tried to hedge against the risks involved in the system of equal inheritance. These registers are available throughout the fifteenth century and contain records about a huge variety of topics, going from rent and purchase contracts, to reconciliatory settlements and all sorts of private arrangements about property. In the Low Countries, the city governors promulgated laws, judged criminal and civil cases but

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27 About these legal statutes, see in M. Vleeschouwers-Van Melkebeek, "Mortificata est: het onterven of doodmaken van het geschaakte meisje in het laatmiddeleeuws Gent" ["Mortificata est: the Disinheritance or Killing of the Abducted Girl in Late Medieval Ghent"], *Handelingen: Koninklijke commissie voor de uitgave der oude wetten en verordeningen van België* [*Acts of the Royal Commission for the Publication of the Ancient Laws and Ordonnances of Belgium]* 51-52 (2011), p. 357-435.

28 V. Vrancken, *De Blijde Inkomsten van de Brabantse hertogen. Macht, opstand en privileges in de vijftiende eeuw* [*The Joyous Entries of the Brabantine Dukes. Power, Revolt and Privileges in the Fifteenth Century*], [Standen en Landen, 112], Brussels, 2018, p. 347-356

29 C. Dunn, *Stolen Women in Medieval England: Rape, Abducton, and Adultery, 1100 – 1500*, Cambridge, 2013; M. Greilsammer, "Rapts de séduction et rapts violents", p. 41-84.

30 C. Dunn, *Stolen women*, p. 117; J. A. Brundage, *Law, Sex, and Christian Society in Medieval Europe*, Chicago, 1987, p. 443.

31 V. Cesco, "Female Abduction, Family Honor, and Women's Agency in Early Modern Venetian Istria", *Journal of Early Modern History* 15 (2011), p. 349-366.

also fulfilled a role as registrars. In return for a fee, citizens came to the aldermen to have them register their voluntary agreements and contracts. This registration by the aldermen's clerks served as an additional guarantee for people entering into legally binding arrangements. The clerks wrote everything down professionally, transforming the orally made arrangement into a sealed charter for each party involved in the transaction. These original charters are often lost, because they ended up in private archives as people took these documents home with them. However, the aldermen noted a copy of each transaction in their extensive registers, because of which historians have access to an incredible wealth of everyday interactions, agreements and arrangements made between citizens in late medieval cities.[32]

An important type of contract preserved in the registers of voluntary jurisdiction of the city of Antwerp shows that some families put significant effort into preventing the possibility of an unfavourable marriage. These contracts between parents or guardians and their daughters recorded an agreement that the daughter would only marry with the consent of her parents. If she contracted a marriage without her parents' agreement, the daughter would not receive her inheritance and she would lose all of her property. I found about fifteen of these private contracts between 1405 and 1464 in the Antwerp aldermen's registers, by scanning them with the search tools made available by the archives.[33] For example, on 17 January 1429, *joffrouwe* Marie, the daughter of the late Henric Driesch, officially promised 'from this day forward she would not contract marriage and would not make any marital promises, also she will not sell, receive, give away or promise her property and inheritance unless she has obtained the consent and approval of four of her close friends and relatives, two on her father's side and two on her mother's'.[34] If she broke this contract, her heirs would get her property because she would lose all of her rights to her inheritance. Margriet, the daughter of Gielijs Willemszoon alias

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[32] These registers are extremely extensive – they contain up to 4.000 registrations per year – and therefore challenging to examine. Luckily, there are some tools available to scan through these registers more efficiently. The *Itinera Nova*-project of the Leuven city archives is transcribing, digitizing, and indexing the registers. The Antwerp city archives provides scholars with a list of the records between 1394 and 1451, and for some additional years from the second half of the fifteenth century. The registers of Ghent are more extensive and are moreover separated in the registers of the aldermen bench of the *Keure* and those of the aldermen bench of the *Gedele*; *Gedele* aldermen acted as chief guardians for the orphans in the city, the *Keure* aldermen acted as judges in criminal and civil cases. Both boards of aldermen in Ghent dealt with ratifying acts of voluntary jurisdiction. Very few of these Ghent registers have been indexed to date, but several studies on family history of medieval Ghent include references to cases relevant for this chapter.

[33] A calendar composed by volunteers at the Antwerp City Archive helped me to track down these deeds.

[34] Antwerp, Felixarchief, Schepenregisters (henceforth: FAA, SR), no. 15, fol. 87v (17 January 1429): '*Dat sij van desen daghe voert gheen huwelic doen en sal, noch oic eenige geloiften van huweliken vorwaerden doen, noch oic gheenre hande goede, have noch erve vercoepen, becommene, wechgeven noch ghelofen en sal tensij bij consente goetduncken ende bij weten van IIII van haren naisten vrienden ende magen, twee van vaders wegen ende twee van der moeder wegen*'.

Breem made a similar promise to her parents; if she married without their consent, all of their property that she would normally receive would be transferred to Margriet's brother.[35] Her parents thus made their unmarried daughter formally acknowledge and promise that she would never marry without consulting her relatives and had that agreement registered by the Antwerp aldermen. Some parents thus took the chance of their daughter being abducted or contracting a secret marriage very seriously and tried to hedge against that risk by making their daughter's right to inherit conditional.

Among these Antwerp contracts, two target the marital behaviour of widows, which underlines that families also aimed for control of more senior supposedly independent members. After all, according to customary law, adult women were fully legally capable. Therefore, they did not have to involve their relatives when selecting a spouse. Records from legal practice reveal that some families tried to prevent that from happening. For example, Kateline Colibrants was the illegitimate daughter of Jan Colibrants, one of Antwerp's elite families, and the widow of Wouter van Roesbroec.[36] If she married without having the approval of Henrick Colibrant, Willem Colibrant the older, Willem Colibrant, and Willem Evernout, the four specified relatives, these men would impound the woman's property. The contract ends as follows: 'she acknowledged that she would have no right or authority over the aforementioned property if she misbehaved or did the aforementioned without the consent of the aforementioned four persons'.[37] Kateline's theoretical ability to make her own choices and select a spouse as an adult woman who did not have to explain herself to her relatives was constrained by this contract that empowered her male relatives to decide or at least be involved in her remarriage. However, it is important to remember that these relatives did not legally force her to do this. Kateline agreed to it, since the record is a private contract, an act of voluntary jurisdiction, agreed upon by both parties. Although it was in principle an agreement based on the free will of both parties, the family was undoubtedly the driving force behind it.

Next to these young and adult single women, the Antwerp records include sons too. Indeed, four men, Danckaert Moeleneren, Jan vanden Kerchove, Jan Mernssoens and Jan Sas, made similar promises in this type of contract. This number is unexpectedly high, since historiography tends to stress the pressure families put on daughters rather than sons.[38] Their contracts are highly similar to the ones made by women and their families, except that they emphasize not only consent

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35 FAA, SR, nr. 21, fol. 252v (2 September 1434).

36 About the Colibrant family, see J. B. Stockmans, *Het geslacht Colibrant en zijn steen te Lier* [*The Lineage of the Colibrant Family and their Castle in Lier*], Lier, 1904.

37 FAA, SR, no. 27, fol. 148v (22 May 1439): '*Zij bekende dat zij aen allen de voirscreven goide gheen recht oft ghesach hebben oft behouden en sal also verre als zij hoer misdroege oft dede tghene des voirscreven is buyten vanden voirscreven IIII personen*'.

38 FAA, SR, no. 29, fol. 37v (7 April 1440); no. 35, fol. 89r (7 May 1445); no. 67, fol. 163r (10 December 1464) and 237r (6 March 1464).

needed for marriage but also the promise that the son would not make any kind of transaction or alteration regarding his property until he reached a specific age. Examining the impediment of force and fear, Corinne Wieben also found that families in Lucca tried to apply force on sons concerning partner choice, an indication that the patriarchal constraints of society could also weigh heavily on young men.[39] One of the Antwerp cases involving sons did not include the age requirement, but the other three cases, all involving orphans, stipulated the age as twenty-eight in two instances and twenty-five in a single instance. Stipulations about age thus limited in time the control imposed by relatives through these contracts. The age factor never appears in any of the contracts targeting the marital behaviour of unmarried daughters or widows. Although these contracts prove that men's marriages and choices of spouse were sometimes also family affairs, they also show that families subjected women to more control that could last a lifetime. Law granted adult women legal independence, but families had clearly found a way around this.

Several of these contracts appear in a less standardised form in the aldermen's registers of Antwerp, and records from the other cities contain small bits of evidence that families there made similar private arrangements in anticipation of an abduction with marital intent or marriages made without parental consent. A contract in the Ghent aldermen's registers of Gedele is similar to the ones made in Antwerp.[40] It concerned a possible remarriage of Gertrude vanden Eechoute, widow of late Ogier de Massemen, a man belonging to one of Ghent's elite families.[41] Advised by their relatives and friends, Gertrude and her children made an arrangement regarding Gertrude's property before the aldermen of Gedele. If Gertrude was abducted or forced into marriage, she pledged to give up all her rights to the property she had inherited from her late husband, and she would pay her children the huge sum of 500 pounds.[42] This contract reveals that Gertrude's family considered the risk that their mother, a wealthy widow belonging to the upper social groups in Ghent, would become the target of men who preyed on her fortune a plausible one. Through this contract, Gertrude committed to not marrying recklessly and doing everything she could to avoid aggressive suitors. Possibly, the rumour of this contract spread in town, promoting the message that abducting this wealthy widow for the purpose of marriage would be a fruitless endeavour.[43] A thorough search of the

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39 C. WIEBEN, "Unwilling Grooms in Fourteenth-Century Lucca", *Journal of Family History* 40 (2015), p. 263-276.

40 About the board of the aldermen of the *Gedele*, see note 28.

41 More about the Van Massemen family, see E. BALTHAU, "La famille Van Massemen/De Masmines: aspects sociaux et matériels ca. 1350-ca. 1450" ["The Van Massemen/De Masmines Family: Social and Material Aspects, ca. 1350-ca. 1450"], *Publications du Centre Européen d'Etudes Bourguignonnes* [*Publications of the European Centre for Burgundian Studies*] 37 (1997), p. 173-193.

42 CAG, series no. 330, no. 21, fol. 49r (1434-1435). I found this case through a reference in E. BALTHAU, "La famille Van Massemen", p. 182-183.

43 Wealthy widows were regularly targeted by abduction, see the fascinating case in which a sixty-year-old widow was abducted in P. ARNADE and W. PREVENIER, *Honor, Vengeance and Social Trouble. Pardon Letters in the Burgundian Low Countries*, Cornell, 2015, p. 146-153, 165-168.

extensive aldermen's registers of Ghent would yield undoubtedly more of these contracts.

In the Leuven aldermen's registers, there are also precautionary measures, albeit difficult to find because they are distributed among diverse types of contracts, sometimes as a few lines in rather lengthy deeds. One contract deals with the maternal property inherited by the siblings Jan and Marie Vander Brugghen, children of Jan Vander Brugghen and late Katlijnen Boys, and makes an arrangement approved by both maternal and paternal relatives. It states that the siblings agreed to not sell or alienate the property they had received in any way and had to consult master Jan van Overwinghe as they managed it. They also promised each other that neither would marry without the consent of the other, or at least without the consent of master Jan; 'they were not allowed to marry, make any negotiations or promises for one of them to contract or being forced into marriage'.[44] If they broke these promises, master Jan could manage the property as he pleased. The significant inclusion of 'being forced into marriage' explains that if one of these siblings was married after a violent abduction, this would still be held against them. Another financial contract involves Margareta, widow of Jan van Doerne. It is a brief standardised obligation note in Latin stating that Margareta had to pay a sum of money to Goeswijn vander Zanden if the aldermen ordered her to do so. A Dutch addition specifies the condition that would trigger their command to Margareta to make the payment. The obligation letter would remain in possession of the Leuven aldermen for as long as Margareta lived. If she were abducted (*onscaect*), the aldermen would give the letter to Goeswijn who would collect the money from Margareta or her heirs.[45] A few years earlier, Marie, widow of Egidius van Quaetbeke, and her daughter Katherina made a similar contract with Jan de Overliesch. If Katherina was abducted, she and her mother had to pay him.[46] Katherina was probably a half-orphan, since only her mother is mentioned. Through this arrangement, her paternal relatives, here presumably represented by Jan de Overliesch, made sure that their customary right to be involved would be respected. In another Leuven record, a certain Jaspar dealt with the inheritance of Katlijnen (surname not included) after her parents died. The contract includes that if she were abducted or committed another wrong, her inheritance would be withheld from her.[47]

These precautionary measures reveal late medieval people's awareness of the possibility that daughters, widows and even sons were much-coveted brides and grooms who could be seduced and forced into marriage or might be inclined to avoid involving their relatives when contracting marriage. The emphasis of these contracts on property shows families' concern for the assets brides and grooms took

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44 SAL, OA, no. 8127, fol. 360rv (3 June 1457): '*En sal noch huwelic aengaen, noch negheen vurwerden noch geluften doen daermede dat enich van hen tot huwelike soude mogen worden getogen oft gedwonghen*'.

45 SAL, OA, no. 7335, fol. 342r (27 September 1440).

46 SAL, OA, no. 7733, fol. 414v (30 April, 1441).

47 SAL, OA, no. 7749, fol. 20r (14 July, 1455).

with them upon marriage and which slipped from the control of the family, a strong argument for the suggestion that the Low Countries' favourable inheritance laws increased family scrutiny and control. Most of these contracts were made within wealthy families. Six of the Antwerp contracts described the women as *jonkvrouw*, a title reserved for women from elite families.[48] The widow in Ghent also belonged to a high social group, and the mother of Jan and Marie Vander Brugghen in Leuven was also addressed as *jonkvrouw*. It is not surprising that wealthy families wanted to make these protective arrangements for their property and paid the aldermen for registering them. Two women in the Antwerp contracts were connected to the guild milieu. They were Kateline, described as the widow of a tanner, and Margriet Lijnmakers, identified as the daughter of an unspecified master artisan. Needless to say, artisan families too could have considerable wealth and influential positions in the city.

Taken together, these contracts indicate that there was much at stake for these elite and wealthy middling groups. Indeed, these contracts all show that the principle of equal inheritance led some families to take precautions. While some stipulations focus on the right for young people to manage their property freely, the choice of spouse seems to have been a true concern. Marriages had socio-economic consequences, since they brought about significant shifts in family property. Therefore, it was just too risky to leave the choice of spouse entirely in the hands of one individual, especially if she were a woman who would take a significant portion of the family estate away from the family and bring it to a new household under the leadership of her husband.

4. Disinheritance?

But what if these men and women broke their contracts? Unfortunately, that question is a difficult one to answer as finding multiple records involving the same couples in the extensive series of aldermen registers is a nearly impossible task. However, the registers of these city governors show that some Low Countries' families did deprive their children of all rights to their families' estate after they married without consulting their relatives.

Evidence is most outspoken in Ghent as the registers of the aldermen of the Keure and the Gedele, which also comprise civil lawsuits, contain eight records about the disinheritance of a woman who married against her parents' wishes.[49] For

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48 About the title '*jonkvrouw*', see A. VAN STEENSEL, *Edelen in Zeeland: macht, rijkdom en status in een laatmiddeleeuwse samenleving* [*Nobles in Zeeland: Power, Wealth and Status in a Late Medieval Society*], Hilversum, 2010, p. 375.

49 The records of the Ghent aldermen of the *Keure* have been searched through completely by Cyriel Vleeschouwers and Monique van Melkebeek, an effort which took them over a decade. All references to cases of disinheritance and abduction were published in M. VLEESCHOUWERS-VAN MELKEBEEK, "Mortificata est".

example, in 1453, twelve-year old Elizabeth Broucx was abducted by Jan de Cupere whom she married. Elizabeth's uncle and other of her relatives reacted by turning to the Ghent aldermen, initiating a lawsuit to disinherit Elizabeth. The aldermen judged that in accordance with the law, Elizabeth would be disinherited 'as if she were dead'.[50] About ten years later, thirteen-year-old Lieven Raes suffered the same fate.[51] I did not find any similar disinheritance lawsuits in Antwerp and Leuven. A possible explanation for this difference is the fact that, as stated earlier, testamentary freedom was way more restricted in Flanders than it was in Brabant. In Ghent, people could only divide one third of their estate through a testament, while two thirds had to be distributed in accordance with inheritance law which guaranteed that each child received an equal share. People were not allowed to deviate from those rules and thus needed the involvement of the city governors if they nevertheless wanted to do so. Indeed, the disinheritance cases in the Ghent records were all civil lawsuits in which the city governors acted as judges. Moreover, the eight disinheritance cases that pop up over the period 1453-1484, all involved the wealthiest families, both from noble and artisan backgrounds, which strongly suggests that the more assets were at stake, the lower the threshold potential heirs needed to turn to such an extreme measure.

The Leuven and Antwerp records do not contain lawsuits centred on the disinheritance of the abductee, possibly because people's ability to dispose of their property freely was not as limited as it was in Ghent and Flanders. However, it is important to not overestimate the use of disinheritance as a reaction to abduction and irregular marriages. Instead of cutting their daughters off, most parents, even in Ghent and even in elite families, reconciled with their children. However, if we dig a little deeper, evidence of families disinheriting their daughters privately without a lawsuit and without the involvement of the city governors pops up too, which might indicate that this phenomenon was broader than it would seem at first sight. Most families indeed reconciled with their daughter and unwanted son-in-law. A reconciliation did not mean that they welcomed the couple with open arms, as it often concerned a conditional forgiveness in which the couple sometimes even had to renounce their rights to the inheritance. A few reconciliatory settlements between the woman's parents or guardians on one side and the couple on the other have been registered by the city governors. These settlements were private settlements and listed the conditions required for reconciliation.

The fullest example is the settlement made after the marriage of Margriet Haenkens and Pieter Moens in Ghent.[52] Although in theory both parties consented to this contract, it is doubtful that Margriet and Pieter were in a position to reject their relatives' demands. The couple voluntarily renounced their rights to the hereditary property which Margriet would have received as a marriage gift if she had

50 CAG, series no. 301, no. 42, fol. 36v (1453).
51 CAG, series no. 301, no. 48, fol. 83v.
52 CAG, series no. 301, no. 20, fol. 40v (16 March 1409).

married under regular circumstances. Pieter had to promise that he would stay silent about the property his wife would be entitled to normally. In the Antwerp records, a similar contract reports the clandestine marriage of Lijsbeth van Kuyck and Laureys Jacob Laureyszone. The contract between Lijsbeth and her parents states that as long as Laureys, the abductor, was alive, Elisabeth would not receive her inheritance. If she was still alive after her husband had passed away, she would receive all property 'she was supposed to get by law'. Depending on who outlived whom, this contract thus either led to the temporary or to the permanent suspension of Elisabeth's right to the inheritance.[53] As outlined earlier, disinheritance was considered an extreme penalty in late medieval Flanders, Brabant and beyond.

The question to the impact disinheritance had on women and their lives rises, yet remains a difficult one to answer. The above-mentioned case of Margriet and Pieter in Ghent, who lost their rights to the family estate gives us some insight in the couple's financial situation after the abduction and disinheritance. In return for losing the hereditary property, Margriet and her husband received thirty *schellingen groten*, a sum corresponding to a month's wages for a skilled worker. In addition to this gift, Margriet's aunt and uncle promised to provide their niece with 'food, drinks, clothes, socks, and shoes, whether she was healthy or sick, for as long as she lived'. Pieter had to promise that he would stay silent about the property his wife would be entitled to normally, an indication that Margriet's parents took into account the possibility that Pieter might attempt to reclaim that property in the future. Even though Margriet's relatives took away her property after her abduction, she was not destined to live in poverty since she would receive support for life. The stipulation on the care her uncle and aunt would give her reveals this family's high social status, since another young couple who married in normal circumstances received the same support of food and clothing for only two years, according to their Antwerp marriage contract from 1432.[54] Two of the women or couples involved in a Ghent disinheritance lawsuit managed to undo their disinheritance. Amelkin Jacops was disinherited by her paternal relatives after being abducted at the age of twelve. After more than a decade, Amelkin managed to have her marriage to her abductor annulled, claiming that he had in fact raped her and forced her into marriage. She married another man and regained her rights to the inheritance.[55] Liesbeth van Massemen also managed to restore her rights to the inheritance together with her husband Jan Van Melle. Twelve years after her relatives successfully disinherited her through a verdict by the aldermen of Ghent, count Charles of Charolais (the later Charles the Bold, duke of Burgundy) pardoned the abduction

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53 FAA, SR, no. 20, fol. 56v (11 June 1433).

54 F. J. VAN DEN BRANDEN (*ed.*), "Oudt register mette Berderen, 1336–1439 (vervolg)" ["Oudt register mette Berderen, 1336-1439 (Continuation)"], *Antwerpsch Archievenblad. Eerste reeks* [*Antwerp Archival Magazine. First series*] 28 ([1892]), p. 352-353.

55 All records on this case have been published in M. VLEESCHOUWERS-VAN MELKEBEEK, "Mortificata est".

with marital intent, acknowledged it and gave the couple their rights to Liesbeth's inheritance back.[56]

Disinheriting a woman out of anger over her choice of spouse (even if it concerned a spouse that had been forced upon her), seems to have been possible but rare in Ghent, Antwerp and Leuven in spite of the threats parents included in the contracts they entered into with their children. In the Low Countries in particular, disinheriting a child completely went in against this region's legal, social and economic 'DNA'. As in other European regions, parents mostly reconciled with their children after an abduction with marital intent.

5. Conclusion

In the Low Countries, the egalitarian character of inheritance law tends to be portrayed by historians as a factor that emancipated women and young people. When we look beyond the law of inheritance and urban customary laws, and dig into the extensive records of voluntary jurisdiction, however, we can get a sense of how families experienced the law, applied it and manoeuvred its limitations. The many private contracts reveal that some families felt threatened by their lack of liberty to dispose of their property as they pleased, especially in Ghent and Antwerp where testamentary freedom was more limited than it was in Leuven. The system of equal inheritance thus seems to have had a reverse side: the increased ability of young people to make life choices more independently might have led to defensive reactions by their families, who lost grip and tried to regain control by making a priori arrangements with their children regarding marriage and the handling of inherited property. Parents did not only try to control their daughters' behaviour, since the aldermen registers also contain records concerning widows and sons. This high age of majority put forward in the contracts concerning men and the fact that even the freedom of adult women was curtailed contrasts sharply with the popular paradigm that young people enjoyed a considerable degree of freedom in this region. It is nevertheless important to keep in mind that actual cases of disinheritance in reaction to marriages made against parental consent were rare. Strict legal texts put forward this penalty mostly to discourage 'untraditional' marriages, and parents warned their children by explicitly attaching conditions to them getting their share of the family estate. Actual disinheritances occurred but seemed to have been rare and happening almost exclusively within the highest elites where the financial risks at stake were simply too big.

[56] CAG, series no. 94, no. 661.

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TESTAMENTARY INHERITANCE IN THE LATE MEDIEVAL POLISH COUNTRYSIDE: SOURCES AND LEGAL PRACTICE*

Agnieszka BARTOSZEWICZ

Abstract – The aim of this contribution is to study the character of the last wills that existed in the Polish countryside in the late Middle Ages and in the early modern era and to analyse the instructions in last wills of peasants (*cmethones*). The writing of a will was largely an activity undertaken by members of the peasant elite. In addition, the network of contacts between the testators' family, economic partners, and neighbours often crosses formal legal boundaries. Therefore, their decisions with regard to last wills were recorded and authorized in the registers of various offices: the village bench register, municipal books and books of church offices. Most peasant testators were closely linked to the Church and the priests, and the influence of the latter can be clearly seen both in the decision to record the last will and in the content of these instructions. However, bequests made to the Church were sometimes subject to litigation. In particular, opposition was expressed to the donation of land, as money or mobile goods were regarded as the appropriate content of pious bequests.

While the study of the medieval practice of last wills is currently in a period of intense development,[1] it is difficult to find research devoted to medieval and early modern testaments of Polish peasants.[2] Thus, it is worth giving thought to the range

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1 The most recent summary of the state of research: J. WYSMUŁEK, *History of Wills. Testators and Their Families in Late Medieval Krakow. Tools of Power* [Later Medieval Europe, 23], Leiden, Boston, 2020.

2 Cf. G. JAWOR, *Ludność chłopska i społeczności wiejskie w województwie lubelskim w późnym średniowieczu. Schyłek XIV – początek XV wieku* [*Peasant Population and Rural Communities in the Lublin Voivodeship in the Late Middle Ages. Late 14th – Early 15th Centuries*], Lublin, 1991, p. 135-137, 169-171; U. SOWINA, "Testament pewnego kmiecia. Przyczynek do badań nad relacjami międzystanowymi w późnym średniowieczu i wczesnej nowożytności" ["The Will of a Peasant. Contribution to the Study of Interstate Relations in the Late Middle Ages and Early Modern Times"], in: *"Civitas et villa" . Miasto i wieś w średniowiecznej Europie Środkowej* [*The Town and Village in Medieval Central Europe*], Wrocław, Prague, 2002, p. 209-214. This issue was more deeply researched for the modern period from the second half of the sixteenth century: J. DICKER, "Testament w polskiem prawie wiejskiem" ["Last Will in Polish Village Law"], in: *Pamiętnik trzydziestolecia pracy naukowej prof. dr. Przemysława Dąbkowskiego wydany staraniem kółka historyczno-prawnego słuchaczów Uniwersytetu*

and character of this phenomenon, starting with the question of how the institution of last will functioned in an environment where writing is not used for daily work and communication.[3] How did the process of writing down the instructions of the testator look like?[4] The matter of institutional sanction, which was necessary to recognize the act of one's last will as legally binding, is also of importance. Thus we enter the questions associated with legal culture and the tension between customary law and the last will of an individual, which in fact constitutes a peculiar feature of the institution of last will.[5] In this context, one needs to consider who made a decision to draw up a last will and what factors influenced in the first place the decision of creating a written act, and secondly – what is the nature of the instructions that have been written down? It can obviously be assumed in advance that the Church had the leading role in the process as it was keenly interested in securing the pious bequests[6] However, it is worth considering how it looked like in practice in the late medieval and early modern Polish countryside. Which church institutions and what priests were of influence for the religiousness of the peasantry in that period? One also needs to take interest in the influence of municipal culture on the countryside, both when it comes to religiousness, but also wider – the culture of writing and the development of pragmatic literacy in the countryside, an important expression of which is the testament.

Jana Kazimierza [*Commemoration of the Thirtieth Anniversary of the Scientific Work of Professor Przemysław Dąbkowski. Published Thanks to the Efforts of the Historical and Legal Circle of Students of the Jan Kazimierz University*], Lviv, 1927, p. 27-38; J. Łosowski (*ed.*), *Testamenty chłopów polskich od drugiej połowy XVI do XVIII wieku*, [*Testaments of Polish Peasants from the Second Half of the 16th to the 18th Centuries*], Lublin, 2015; idem, *Dokumentacja w życiu chłopów w okresie staropolskim. Studium z dziejów kultury* [*Documentation in the Life of Peasants in the Old Polish Period. The Study of Cultural History*], Lublin, 2013; T. Wiślicz, *'Zarobić na duszne zbawienie'. Religijność chłopów małopolskich od połowy XVI do końca XVIII wieku* [*'Earn soulful salvation'. Peasant Religion in Lesser Poland from the Mid-16th to the end of the 18th Century*], Warsaw, 2001, p. 101-103.

[3] Compare remarks concerning using written word in peasants environment: J.-P. Jesenne and F. Menant, "Introduction", in: Iidem (*eds.*), *Les élites rurales dans l'Europe médiévale et moderne. Actes des XXVIIes Journées Internationales d'Histoire de l'Abbaye de Flaran 9, 10, 11 septembre 2005* [*Rural Elites in Medieval and Modern Europe. Acts of the 27th International Days of the History of the Abbey of Flaran, 9, 10, 11 September 2005*], Toulouse, 2007, p. 14-16; 14; A. Adamska and M. Mostert, "The Literacies of Medieval Towndwellers and Peasants: A Preliminary Investigation'', in: A. Bartoszewicz *et al.* (*eds.*), *Świat średniowiecza. Studia ofiarowane Profesorowi Henrykowi Samsonowiczowi* [*The Medieval World. Studies Presented to Professor Henryk Samsonowicz*], Warsaw, 2010, p. 318-320.

[4] A. Adamska, "Stąd do wieczności. Testament w perspektywie piśmienności pragmatycznej na przełomie średniowiecza i epoki nowożytnej" ["From Here to Eternity. Medieval and Early Modern Testaments from the Perspective of Pragmatic Literacy"], *Kwartalnik Historii Kultury Materialnej* [*The Quarterly of the History of Material Culture*] 61/2 (2013) 2, p. 191; M. Lupescu Makó, "Spoken and Written Words in Testaments: Orality and Literacy in Last Wills of Medieval Transylvanian Burghers", in: M. Mostert and A. Adamska (*eds.*), *Uses of the Written Word in Medieval Towns. Medieval Urban Literacy II* [Utrecht Studies in Medieval Literacy, 28], Turnhout, 2014, p. 286-296.

[5] J. Wysmułek, *History of Wills,* p. 9-11; A. Adamska, "Stąd do wieczności", p. 188.

[6] A. Adamska, "Stąd do wieczności", p. 188.

The source base for the research presented here were the instructions of the last will of people described in the sources as *cmethones* (peasants) and *laboriosi* (diligent, hardworking), which signified the affiliation with peasantry.[7] Additionally, the research included the testamentary practices of the heads of the village (*sculteti*, *advocati*), whose formal legal status could have varied. The majority of the heads of village formally belonged to the gentry, but there was a group of burghers and peasants, and even priests, among them.[8] Thus, in practice, they functioned on the border of divisions established by formal social status. From our point of view the most important fact is that the heads of the village were responsible for the functioning of the rural court of law, and were playing the role of intermediaries between the world of legal culture and the traditional oral culture of the countryside.

Before we reach the main theme of the study, it is worth mentioning that a specific feature of the testaments is the sex of testators. The testaments of female peasants can be found only exceptionally.[9] This confirms the dominant patriarchal relations present in the country, which were actually noted in source literature.[10] It needs, however, to be noted that in the later period a significant change can be observed, as testaments of women constitute about 30% of the preserved source material from the modern period.[11] This seems to result from the progressive reception of testamentary practices, which in time lose their exclusive and masculine character.

The form of testamentary bequests is closely related to the circumstances of their creation and, above all, the place where the last will was authenticated. The analysed acts of last will received legal force by entries in registers kept by offices which represented different legal systems, and also different levels of written culture. Thus, this study also needs to take into account the registers recording the rural

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7 In sources from the territory of the Polish Kingdom, the distinctions indicating social status were relatively stable (although with exceptions). Generally, adjectives *providus* and *honestus* were characteristic for the burghers, *nobilis* for the gentry and *laboriosus* for the peasants. Cf. M. Bogucka and H. Samsonowicz, *Dzieje miast i mieszczaństwa w Polsce przedrozbiorowej* [*The History of Towns and Burghers in Poland before the Partitions*], Wrocław, Warsaw, Kraków, Gdańsk, Łódź, 1986, p. 130-140; H. Samsonowicz, "Relacje międzystanowe w Polsce XV wieku" ["Interstate Relations in Poland in the 15th Century"], in: S. K. Kuczyński (*ed.*), *Społeczeństwo Polski Średniowiecznej* [*Society of Medieval Poland*], 2, Warsaw, 1982, p. 245-250; A. Wyczański, *Szlachta polska XVI wieku* [*Polish Gentry in the 16th Century*], Warsaw, 2001, p. 32; U. Sowina, "Testaments of the Burghers from Sieradz 1500-1538", *Acta Poloniae Historica* 67 (1993), p. 51, 78.

8 A. Bartoszewicz "Elity chłopskie wobec piśmienności pragmatycznej w drugiej połowie XV i na początku XVI w. Rekonesans badawczy" ["Peasants Elites and Pragmatic Literacy in the Second Half of the 15th and Early 16th Centuries"], in: *Monarchia, społeczeństwo, tożsamość. Studia z dziejów średniowiecza. Prace ofiarowane Profesorowi Sławomirowi Gawlasowi* [*Monarchy, Society, Identity. Studies Presented to Professor Sławomir Gawlas*], Warsaw, 2019, p. 374-376.

9 Only nine out of 98 researched acts of last will were made by women.

10 M. Kołacz-Chmiel, *'Mulier honesta et laboriosa'. Kobieta w rodzinie chłopskiej późnośredniowiecznej Małopolski* ['*Mulier honesta et laboriosa'. A Woman in a Peasant Family in Late Medieval Lesser Poland*], Lublin, 2018, p. 20.

11 J. Łosowski (*ed.*), *Testamenty chłopów polskich*, passim.

court's actions, the books of the church offices, and the books kept by municipal officials. Within these source types, the preliminary research identified ninety-eight records of acts of last will (testaments, single bequests, mentions of bequests) made by peasants and heads of a village within the period of 1395-1530. The following considerations are based on these sources.

1. *Loca scribendi – loca credibilia*

a. Rural court books

The books held by the rural governmental bodies seem to be the most obvious place of authenticating the testaments made by the peasants.[12] Indeed, rural registers had this function, though, as described below, rural benches were only one of a few types of *loca scribendi* that served the rural clientele.

In rural books, there were usually two ways of communicating and verifying testamentary instructions. It could be the record of a declaration made by the testator, or a testimony of witnesses informing about such instructions after the testator's death. In both cases these are often short notes informing of individual donations, but made, as noted by the scribes, *testamentaliter* or *in articulo mortis*.

While the witnesses made their statements during the bench meeting, the testators often announced their last will at home. Some sources are preserved describing the ritual of the last will in the peasants' houses. When the testator was ill, there was a gathering at his bed consisting of relatives and clerks, members of the rural bench, and a member of the clergy, who was responsible for recording the instructions announced.[13] The testimonies confirming that the inhabitants of the

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[12] About registers of courts of villages see: T. Wiślicz (*ed.*), *Katalog małopolskich ksiąg sądowych wiejskich XV-XVIII w.* [*Catalogue of Rural Court Books from Lesser Poland in the 15th-18th Centuries*], Warsaw, 2007, passim; T. Wiślicz, "Księgi sądowe wiejskie z XV w." ["Rural Court Books from the 15th Century"], in: A. Bartoszewicz *et al.* (*eds.*), *Świat średniowiecza. Studia ofiarowane Profesorowi Henrykowi Samsonowiczowi* [*The Medieval World. Studies Presented to Professor Henryk Samsonowicz*], Warsaw, 2010, p. 291-298; T. Wiślicz (*ed.*), Collectanea ad historiam plebeanorum, online database, www.plebeanorum.wordpress.com, accessed 4 April 2023; J. Łosowski, "Dokumenty i kancelarie wiejskie" ["Rural documents and chanceries"], in: T. Jurek (*ed.*), *Dyplomatyka staropolska* [*Diplomatic in the Old Polish Period*], Warsaw, 2015, p. 401-412; S. Grodziski, "Księgi sądowe wiejskie (zasięg terytorialny i geneza)" ["Rural Courts Registers (Territorial Scope and Genesis)"], *Czasopismo Prawno-Historyczne* [*Legal and Historical Journal*] 12/1 (1960), p. 85-140; idem, "Jeszcze o księgach sądowych" ["More About Courts' Registers"], *Czasopismo Prawno-Historyczne* [*Legal and Historical Journal*] 15/1 (1963), p. 287-292; L. Łysiak, "W sprawie genezy ksiąg sądowych wiejskich" ["On the Genesis of Rural Courts' Registers"], *Czasopismo Prawno-Historyczne* [*Legal and Historical Journal*] 14/2 (1962), p. 175-194; A. Vetulani, "Wartość badawcza ksiąg sądowych wiejskich" ["Research Value of Rural Courts' Registers"], in: *VIII Powszechny Zjazd Historyków Polskich w Krakowie 14-17 IX 1958* [*Eighth General Congress of Polish Historians in Kraków,14-17 September 1958*] 7, Warsaw, 1959, p. 99-114.

[13] We are dealing with an analogous ceremony also in towns, and not only Polish ones, while in the countryside it was considered as the optimal one in the modern period, T. Wiślicz, "Chłopskie

countryside were observing the procedures of ceremonial and public announcement of one's last will by an ill testator are relatively early. On 2 February 1430, the village officials of Trześniów and the local parish priest came to the house of a sick peasant named Święch to collect instructions in his last will.[14] The record made in incapable Latin demonstrates, however, the effort of the scribe who was attempting to imitate the form of a notarial instrument.[15] The date of this event – an important Marian holiday (*Purificatio Beate Virginis Marie*) – also seems not to be accidental. The aim of the record was also clearly formed: safeguarding the rights of the Church to the granted field against the claims of the late testator's relatives, in particular of the children and grandchildren. This points to us the initiator of the legal action: most likely it was an unnamed parson, who was the most interested party as regards the authentication of the donation made.[16]

If the testator was of better health, issuing the act of last will could have taken a different form. As noted in the bench book of Jadowniki village, in 1522, a certain Matys Mąszowicz invited the jury members and the neighbours for a drink in order to announce that after his death all assets are to be passed over to his wife and two sons, and that other relatives were excluded from the inheritance.[17] In this case the changes in the established order of inheritance demanded a public announcement and a setting appropriate for financial operations concluded in the countryside. The analogy to the custom referred to as *litkup*, or a ceremonious drinking in the company of witnesses to the sale transaction made, is clearly distinguishable.[18]

Often one learns *ex post* about the testamentary dispositions made by peasant testators, from the notes confirming their execution by specific donations.[19] The

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pogrzeby w Polsce od drugiej połowy XVI do końca XVIII wieku" ["Peasant Funerals between the Second Half of the 16th and the End of the 18th Centuries"], *Kwartalnik Historii Kultury Materialnej* [*The Quarterly of the History of Material Culture*] 45/3-4 (1997), p. 357; IDEM, "Peasant Funerals in Early Modern Poland", *Acta Poloniae Historica* 82 (2000), p. 63. Extraordinary courts called 'necessary' (*iudicium bannitum necessarium*) in a house of ill testators were held in Nowa Wieś near Kraków. Kraków, National Archives in Kraków (henceforth: KNAK), Acta iudicii banniti Novae Regiae Villae, sign. 29/57/0/-/1, fol. 3 (1517).

14 H. POLACZKÓWNA (*ed.*), *Najstarsza księga sądowa wsi Trześniowa 1419-1609* [*The Oldest Court Book of the Trześniów Village*], Lviv, 1923, no. 20.

15 Ibidem, '… *ipso die Purificacionis sancte Marie hora meridiei in Brzozow … providus vir Swench in domo sua propria in Brzozowa donata ac vendita propter senium suum et infirmitatem ad iudicia non potens accedere…*'.

16 It needs to be added that the field granted on a deathbed eventually returned to its rightful inheritors, when it was sold to them by the bestowed pardoner, ibidem, no. 75.

17 B. ULANOWSKI (*ed.*), *Księgi sądowe wiejskie* [*Rural Courts Registers*], 2 [Starodawne prawa polskiego pomniki, 12 = Ancient Polish Law Monuments, 12], Kraków, 1921, no. 6073: '*Matis Mąszowicz bibere peciit et vocavit scabinos et consocios suos ad testimonium, faciendo sub pristina memoria testamentum…*'.

18 About *litkup* see: CH. MCNALL, "Litkup in the Rural Court Books of Old-Time Poland", *Czasopismo Prawno-Historyczne* [*Legal and Historical Journal*] 49/1-2 (1997), p. 11-25.

19 B. ULANOWSKI (*ed.*), *Księgi sądowe wiejskie* [*Rural Courts Registers*], 1 [Starodawne prawa polskiego pomniki, 11 = Ancient Polish Law Monuments, 11], Kraków, 1921, nos. 590 (1500), 625 (1510).

basis for the book record was – in this case – the testimony of people quoting an oral declaration of the testator that was made in the presence of witnesses, usually members of the testator's closest family. For example, Stanislaus Czchowski, a smith, declared in front of the bench members in Trześniów that, while on her deathbed, his sister Anna decided to grant certain amounts of funds to the relatives and the church of Saint Catherine in Jasionów.[20] Furthermore, in the bench book of the village Krościenko one learns that, while passing a sum of money to the local parish, the widow of Stanczel Szynglarz stressed that this is the bequest made by her husband *testamentaliter*.[21]

This type of mentions might suggest that the ceremony of bidding farewell to the dying might have had a private nature. It was taking place in the presence of the family, sometimes possibly also a priest. If the decisions announced did not raise controversies, nobody was taking care to put them down in writing. One can only learn about them by accident, when the heirs were conducting some actions connected to the wealth inherited. For example, in 1527 the innkeeper Margarethe appeared before the members of the bench of Jadowniki village. She declared that while *in agone mortis,* her husband bequeathed to her half of the inn, which she later passed on to her son in exchange for five marks.[22] This is the only mention on the basis of which one can conclude that the innkeeper from Jadowniki made any postmortal arrangements.

Pious bequests were evidently a deviation from the order of inheritance determined by law and custom, yet even these were not always authenticated with a book record. Prerequisites suggesting the execution of oral instructions of the deceased, regarding grants *ad pias causas,* were preserved. For example, in 1463, siblings Anna and Peter from Krościenko donated four marks from their paternal property, with which a chasuble for the local church was to be funded *in memoria parentum ipsorum*.[23] Obviously, it could have been the children's own initiative, however, it seems more likely that the donation was an execution of a decision made by the late father.

Documents confirming that spouses have made so-called 'joint last wills', in other words, agreements between husband and wife providing mutual inheritance of their property, were not popular in the agricultural environment. Only residents of villages nearest to the towns sometimes made such joint last wills, for example the head of village Nowa Wieś near Kraków Stanislaus Fiszberg and his wife Catherina, *nota bene* born in town, Kleparz.[24]

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[20] H. Polaczkówna (*ed.*), *Najstarsza księga*, no. 706 (1529). Similarly: L. Łysiak (*ed.*), *Księga sądowa wsi Wary 1449-1623* [*Wara Village Court Register 1449-1623*] [Starodawne prawa polskiego pomniki, II, 8 = Ancient Polish Law Monuments, II, 8], Wrocław, 1971, no. 21 (1454).

[21] B. Ulanowski (*ed.*), *Księgi*, 1, nos. 2462, 2463 (1470). Similarly: ibidem, nos. 2652, 2653 (1526).

[22] Idem (*ed.*), *Księgi*, 2, no. 4850.

[23] Idem (*ed.*), *Księgi*, 1, no. 2391. Similarly: *ibidem*, no. 2393 (1464).

[24] Nowa Wieś Court Register, Warsaw, Central Archives of Historical Records (henceforth: WCAHR), Zbiór Branickich z Suchej [Archival Collection of the Branicki Family from Sucha], sign.

b. Municipal books

Some of the testators originating in rural communities decided to authenticate their will in municipal offices. This does not come as a surprise as the presence of peasant clientele can be observed by analysing the court books of all urban centres. One also needs to stress the specific situation of the inhabitants of those villages that were located close to towns and belonged to urban parishes. There is no doubt about the influence it had on religious culture and possible bequests of this nature. What cannot be omitted is the importance of economic contacts and their influence on the testator, along with their participation in the written culture. It was particularly important specifically in the case of villages located nearby towns, which often played the role of suburbia, and which were sometimes owned by the burghers of those towns.[25]

The information on testamentary records of the inhabitants of rural areas being present in municipal registers appears relatively early. The execution of the last will of Martin, head of the village of Rzepiennik, was written in municipal records of Biecz in 1395,[26] so in the period from which rural records were not preserved yet.[27] It needs to be, however, noticed that the testaments of peasants do not appear in municipal records on a large scale, *e.g.* among 573 acts of last will recorded in the catalogue of testaments from the court records of small and medium towns of the Kingdom of Poland up to 1525 only ten were made by peasants or heads of a village.[28]

It should be noted here that some testators described with the term *laboriosus* were strongly connected to the cities. Among the peasants authenticating their last will in bench or city council offices were the owners of agricultural land within the

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1/357/0/62 (henceforth: Nowa Wieś), fol. 17 (1450). Almost 20 years later Stanislaus made a testament confirming donations for his wife. However, after the death of the wife this legacy was to go to his nephews: Ibidem, fol. 45-46 (1477).

[25] A. Bartoszewicz, *Urban Literacy in Late Medieval Poland* [Utrecht Studies in Medieval Literacy, 39], Turnhout, 2017, p. 399-400.

[26] B. Ulanowski (*ed.*), "Najdawniejsza księga sądowa miasta Biecza" ["The Earliest Court Register of the Town of Biecz"], *Archiwum Komisyi Prawniczej PAU* [*Archives of the Law Commission*], 5 (1897), no. 412.

[27] In the case of the Polish Kingdom in the Middle Ages, the first records of the village registers preserved since 1408 (the bench register of the village Krościenko in Red Ruthenia). Furthermore, the village court book of Trześniów was founded in 1419, in Brzezówka (both in Red Ruthenia) in 1429. Nowa Wieś near Kraków has records of the court since 1439. Since the 1440s, the number of preserved village registers has systematically increased. T. Wiślicz, "Księgi sądowe wiejskie", p. 290-291.

[28] A. Bartoszewicz *et al.* (*eds.*), *Testamenty z ksiąg sądowych małych miast polskich do 1525 roku* [*Wills from Polish Small Town Court Registers until 1525*] [Katalogi testamentów mieszkańców miast z terenów Korony i Wielkiego Księstwa Litewskiego do 1795 roku, 5 = Catalogues of Wills of Polish-Lithuanian Commonwealth Inhabitants, 5], Warsaw, 2017 (further: *Testamenty. Catalogues*), passim. The testament catalogue contains only the complete documents written in the registers of the courts, it does not contain references to the execution of testaments and individual donations *ad pias causas*.

city's limits, inhabitants of the suburban areas, owners of city houses, finally, people who run business in cities, *e.g.* in trade of agricultural products.[29] Their social status was not entirely clear, which was in fact noted by the scribes composing these records. For instance, Martin Brzesz, who authenticated his last will at the bench court in Kazimierz near Kraków, was described by the scribe as *providus* and *laboriosus*,[30] Nicolas Byczek of Makocice – *providus cmeto*.[31] Also in the case of John Wanat, who announced his last will in the presence of municipal authorities of Pleszew, the scribe appears to have been slightly confused as in the heading he referred to the testator as *laboriosus*, but in the text of the record he used the term *providus*.[32]

The testaments of peasants recorded in urban registers are most often protocols of oral statements of the testator made in the presence of municipal officials; however some are preserved as copies of documents.[33] They do not differ in form or in character from the testaments of burghers. They include legates benefitting closer and extended family. They also, though not always – which needs to be stressed – contain donations benefiting urban religious institutions such as parish churches, monasteries or hospitals.[34]

c. Books of church offices

The testaments of peasants included in church records, also the *loca credibilia* available for the rural clientele, differ in form from most analogous records in rural and municipal books. They are the copies of notarial deeds or documents with a similar template to them.[35] Apart from the always necessary formula informing that the testator is acting consciously and out of free will, there is an invocation and a dating formula using the Roman calendar, characteristic for a notarial deed. The introductory part of the testament also includes the formula entrusting the soul to God or a statement on the inevitability of death.[36] This manner of editing the text

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29 Ibidem, no. 288 (1512); U. Sowina, "Testament pewnego kmiecia", p. 209-214.

30 *Testamenty. Catalogues*, no. 147 (1510). About the distinction indicating social status, see supra, note 7.

31 U. Sowina, "Testament pewnego kmiecia", p. 209.

32 A. Kozak (*ed.*), *Najstarsza pleszewska księga radziecka: Zapiski z lat 1485-1519* [*The Oldest Counsil Register of Pleszew. Records from 1485-1519*] [Wielkopolska Dawniej i Dziś: Studia, Źródła i Materiały, 4 = Greater Poland Past and Present: Studies, Sources, Materials, 4], Poznań, 2014, no. 20 (1492).

33 WCAHR, Księgi miejskie Sieradz [Town Books of Sieradz], sign. 1/148/0/-/3, fol. 19v.-20 (1507); *Testamenty. Catalogues,* no 402 (1513).

34 U. Sowina, "Testament pewnego kmiecia", p. 209-214; WCAHR, Księgi miejskie Sieradz, fol. 19v-20 (1507).

35 Among the reviewed testaments of peasants that were recorded in the secular offices of small towns only two had a form based on a notarial deed. See infra, note 33.

36 WCAHR, Pułtuskie testamenta konsystorskie [Pułtusk Consistory Testaments], Castrensia Pultoviensia, sign. 1/42/0/1 (henceforth: Pułtuskie testamenta), p. 824: '*In nomine Domini Amen. Anno incarnacionis Jesu nostri millesimo quingentesimo undecimo die Veneris secunda mensis Iunii laborio-*

of the testament does not surprise as the majority (if not all) of these documents were written by the clergy,[37] and they were written down with the intention of authentication in church offices. Thus one is most likely facing a proof of the scribe's skill and his knowledge of standard formulas rather than a proof of the testator's devotion and his knowledge on the practices for a "good death". Obviously, there can be no doubt that there was some kind of a religious ritual connected to the act of composing such a testament, and the decision on such and not another manner of authenticating one's last will was the proof of the relationship of the testator to the Church. The most important testimony on piety were also in such cases the bequests *ad pias causas*, which shall be described later.

d. Testament in the form of a document

The acts of last will were included in church records usually after the testator's death. As can be seen in the preserved notes in records of consistory courts, the period varied from a few days to even over two to three years.[38] Thus, one needs to wonder who kept the written bequests, and where. Did the document prepared by a priest stay in his hands, or was it kept by the testator? The answer to this question is not easy. The testaments of peasants in the form of separate documents practically did not survive until today. An exception is the document issued in 1443 by the prior and the friars of the Augustinian convent at St. Catherine's church in Stradom near Kraków, which confirmed the donation of arable land – which was incidentally purchased for this exact purpose – made by Albert of Lubocza.[39] In this case creating a record was in the interest of the beneficiary, and the friars took care of the document, which was kept in their archives. Was there another copy of this act that was in the hands of the donator? It is difficult to answer this question, but there can be no doubt that heads of the village and more prosperous peasants were collecting written documentation, mainly concerning the property they owned,[40] and so storing a testament would not be a rarity.

It can easily be argued that the task of recording the last wills of peasants in writing was mainly assigned to the clergy.[41] An exception to that rule were oral

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sus Jacobus Budek de Pomorze laborans in extremis, sanus mente sed corpore impotens, sciens nihil cercius morte et incercius hora mortis …'.

37 Compare infra, note 41.

38 For example the testament of Nicolas Dąbrowa, created on 16 October 1515 and recorded in the register of Pułtusk Consistory on 22 February 1518. WCAHR, Pułtuskie testamenta, s. 897.

39 F. Piekosiński (*ed.*), *Kodeks dyplomatyczny Małopolski* [*Codex Diplomaticus Poloniae Minoris*], vol. 4, [Monumenta Medii Aevi Historica Res Gestas Poloniae Illustrantia, 17), Kraków, 1905, no. 1443.

40 A. Bartoszewicz "Elity chłopskie", p. 375.

41 Some testaments include the information on the scribe, *e.g.* the testament of Nicolas, brother of a miller from Przewodów, was written down by Nicolas of Domosław, the rector of the local parish school, WCAHR, Pułtuskie testamenta, p. 830 (1509); the testament of Nicolas Dąbrowa to John, vicar of the church in Sałków, ibidem, p. 897 (1515). Compare E. Kobylińska, "Pisarze testamentów obla-

declarations made at municipal offices, recorded by municipal scribes (nota bene – who in many cases were also priests).[42] There is therefore no doubt that priests influenced the decisions of the testator. This is indicated not only by the pious bequests and their amount, but also by the provisions made for the benefit of individual priests as well as the clergy appearing in the role of witnesses and the executors of the last will's dispositions.[43]

The clergy writing down and editing the testaments were deciding also on the language of these documents – Latin. Obviously, the scribes represented different levels of knowledge of this language, but they usually did not make use of vernacular incursions. Even single words in Polish or German appear in peasants' testaments of the reviewed period only rather sporadically.

2. Donations *ad pias causas*

As mentioned above, donations for pious purposes are contained in a predominant majority of peasants' testaments. Usually, the peasants made donations to the local parish church, yet bequests to other institutions also appear on a regular basis. The beneficiaries of these were monastic churches, brotherhoods and hospitals,[44] some testators made bequests to more than one religious institution.[45] Very often the pious purpose was explicitly indicated: '*pro salute anime sue*' or '*pro anima sua*',[46] sometimes with an instruction to officiate Mass,[47] sometimes prayers for deceased relatives were being mentioned.[48] The size of the bequests could also vary, and it

towanych w księdze pierwszej 'Pułtuskich testamentów konsystorskich' (1509-1518)" ["The Writers of the Testaments Registered in the 'First Book of Pułtusk Consistory Testaments' (1509-1518)"], *Kwartalnik Historii Kultury Materialnej* [*The Quarterly of the History of Material Culture*] 62/3 (2014), p. 338.

42 Another exception is that the charter issued by the administrator of Kraków castle confirmed the donations made by Margarethe, inhabitant of Nowa Wieś near Kraków. A copy of the document is written down in the bench book of Nowa Wieś. WCAHR, Nowa Wieś, fol. 71r-71v (1490).

43 *E.g.* B. Ulanowski (*ed.*), *Księgi*, 1, no. 2640 (1494); WCAHR, Pułtuskie testamenta, p. 824 (1511), 831 (1512); KNAK, Jurydyka Biskupie. Acta curie episcopalis Cracoviensis, sign. 29/37/0/1/1, p. 127 (1519).

44 *E.g.* WCAHR, Nowa Wieś, fol. 55v. (1482), 71v-72 (1490); WCAHR, Pułtuskie testamenta, p. 824 (1511); WCAHR, Księgi miejskie Sieradz, fol. 19v-20r (1507); F. Piekosiński (*ed.*), *Kodeks dyplomatyczny Małopolski*, 4, no 1443 (1443); U. Sowina, "Testament pewnego kmiecia", p. 211.

45 *E.g. laboriosus* Nicolas Biczek made donations to the parish church in Proszowice and the local hospital of the Holy Spirit (U. Sowina, "Testament pewnego kmiecia", p. 211), Gall, miller from Trześniów, to the hospital in Krosno and the parish church in Jasionów (H. Polaczkówna (*ed.*), *Najstarsza księga*, no. 376, 1489), Dorothy from Lubiatówka to two parish churches in Rogi and Dukla (WCAHR, Księgi wiejskie Lubiatówka [Bench registers of Lubiatówka], sign. 1/164, fol. 80v, 1501).

46 *E.g.* B. Ulanowski (*ed.*), *Księgi*, 1, no. 590 (1500), 625 (1510).

47 WCAHR, Pułtuskie testamenta, p. 824 ('*ad opera misericordie pro salute anime mee et ad tricesimas*', 1511), p. 939 ('*pro missis celebrandis*', 1517).

48 H. Polaczkówna (*ed.*), *Najstarsza księga*, no. 20 (1430): '*donavit causa Dei et filii sui bone memorie*'. Similarly: Lviv, Central State Historical Archives of Ukraine in Lviv (henceforth: LCSHA), Bench Book of Futoma, fond 814, op. 1, sign. 1 (henceforth: Bench Book of Futoma), p. 53 (1482).

usually indicated the wealth of the testator: two marks,[49] two *schocks*,[50] one *schock*.[51] There were even more generous bequests, *e.g.* John Fryzuch of Czerwin in Mazovia made a bequest of six *schocks* and a horse to the benefit of a local parish church.[52] James Budek from Pomorze village allocated six *schocks* to the needs of the Augustinian monastery in Ciechanów, and a similar amount was to benefit the parish church.[53] The bequests for religious institutions in Proszkowice town made by Nicolas Byczek of Makocice were up to 11,5 mark.[54]

The bequests made for individual priests usually were not that high, *e.g.* Stanczel Szynglarz of Krościenko gifted one mark to the local church and half a mark to parson Martin.[55] Gregory, head of the village from Bogucin, made a pious bequest of a sizeable amount of 100 *groszy* for the local church, and a local vicar John of Rembów was to receive a crossbow.[56] In this latter case the bequest should be interpreted as the salary of the priest, who was the scribe writing down Gregory's testament. However, it is remarkable that the bequest took shape as a specific object from to the testator's personal property.

3. Social reception of the testaments

In the literature on the subject it is generally accepted that the dynamic development of testamentary practices in medieval cities is linked to the mobility of the burghers and that the role of family ties is decreasing as networks of various types of contacts are established. Despite such conditions, which were allowing individuals for greater independence in deciding upon one's own fate and the fate of one's wealth, testamentary bequests going against the order of intestate inheritance regulated by law and customary practice were accepted by the society only to a limited extent.[57] One needs to consider then, how the testamentary institution was received in a naturally more traditional peasant society.

It can be assumed that pious donations, especially when publicly announced and also authenticated in writing, were difficult to challenge. However, bequests for

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49 B. Ulanowski (*ed.*), *Księgi*, 2, no. 4472 (1473); Idem (*ed.*), *Księgi,* 1, no. 590 (1500).

50 Idem (*ed.*), *Księgi*, 1, no. 625 (1510).

51 Idem (*ed.*), *Księgi*, 1, no. 3752 (1545).

52 WCAHR, Pułtuskie testamenta, p. 951 (1518). John of Smolechowo was equally generous, ibidem, p. 939-940 (1517).

53 WCAHR, Pułtuskie testamenta, p. 824 (1511).

54 U. Sowina, "Testament pewnego kmiecia", p. 211.

55 Similarly: B. Ulanowski (*ed.*), *Księgi*, 1, nos. 3752 (1545); 939-940 (1517). See also the Księga sądowa wsi Rajbrot [Bench Book of Rajbrot]: KNAK, Variae civitates et villae, sign. 29/121/0/-/175, p. 46 (1511).

56 WCAHR, Pułtuskie testamenta p. 824 (1503).

57 J. Wysmułek, *History of Wills,* p. 43-50.

the benefit of the Church were subject of lawsuits.[58] In particular, opposition was raised to the donation of land for sacred purposes, because money or moveable goods were considered to be the appropriate content of pious bequests.[59] Real estate designated *ad pias causas* was most often returned to the rightful heirs in exchange for cash.[60] It could also happen that a bequest of agrarian land was triggering conflicts eventually solved in court.[61] It needs to be stressed, however, that property, real estate (houses) and fields were very rarely mentioned in the testaments. Peasants usually listed cash,[62] as well as animals (oxen, cows, horses) and agricultural products (grain, honey, wax) at their disposal, rarely clothes or precious items.[63] Immoveable property was either transferred upon its rightful heir(s),[64] or the inheritance of such was simply omitted by the testators.[65] Probably it followed the usual rules of *ab intestato* inheritance according to the rules of inheritance law, first of all customary law.[66]

Making the act of last will in the case of peasants often was more than just a practical matter. It could turn into a demonstration of affiliation to the elite, to a group outstanding as regards piety, contacts with the Church and the world of educated people. One needs to remember that in the countryside, just as in the urban environment, performing the act of last will was a public event. The relatives and

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58 L. Łysiak and K. Nehlsen-v. Stryk (*eds.*), *Decreta iuris supremi Magdeburgensis castri Cracoviensis. Die Rechtssprüche des Oberhofs des deutschen Rechts auf der Burg zu Krakau* [*The Judgments of the Supreme Court of German Law at Kraków Castle*] 1, Frankfurt am Main, 1995, no. 966 (1468). Compare infra, note 70.

59 See infra, note 71.

60 H. Polaczkówna (*ed.*), *Najstarsza księga*, no 75; Jadowniki in: T. Jurek (*ed.*), *Słownik historyczno-geograficzny ziem polskich w średniowieczu. Edycja elektroniczna* [Dictionary of Historical-Geographical Polish Lands in the Middle Ages, Online Database], (www.slownik.ihpan.edu.pl), accessed 29 December 2022 (1499, 1500).

61 *E.g.* Lipnica Górna, www.slownik.ihpan.edu.pl (1524-1525).

62 *E.g.* LCSHA, Bench Book of Futoma, p. 52-53 (1467), 150 (1481). See also supra, notes 49-53.

63 *E.g.* LCSHA, Bench Book of Futoma, p. 23 (cow and wax, 1452); Kraków, Biblioteka Naukowa Polskiej Akademii Umiejętności i Polskiej Akademii Nauk w Krakowie, Księga gromadzka wsi Bielcza [Village Register of Bielcza], ms. 1946, p. 5 (oxen, 1484); WCAHR, Pułtuskie testamenta, p. 951 (horse, 1518). See also infra, note 65.

64 In his testament, John of Smolechowo included a very long list of monetary legates benefitting the parish church, a priest from that church, as well as children and their mother. It is only at the end of the document that he remarked that the remaining movable and non-movable goods were to be bequeathed to his wife and his offspring, WCAHR, Pułtuskie testamenta, p. 939-940 (1517).

65 *E.g.* Nicolas Dąbrowa gifted cash, grain, oxen and cows for pious reasons and made a gift of his clothes to his sister, while the subject of property was not mentioned in the testament at all, WCAHR, Pułtuskie testamenta, p. 896-897 (1515). Similarly: Niałek Wielki, www.slownik.ihpan.edu.pl (1508).

66 Legal plurality can be observed both in the entire territory of the Polish Kingdom and in the countryside. The village was governed by German, Polish, Ruthenian or Wallachian law. Almost all preserved wills were created in villages with German law, but the legal culture of peasants and the actual adoption of the German legal system in the country is still an open question. Cf. J. Matuszewski, "Prawo sądowe na wsi polskiej lokowanej na prawie niemieckim" ["Jurisdiction in Polish Villages Ruled by German Law"], *Studia z Dziejów Państwa i Prawa Polskiego* [*Studies in the History of the State and Polish Law*] 2 (1995), p. 47-63.

neighbours were the witnesses of the testator, who could increase his own and his family's prestige – this is often noticeable in peasant's testaments. Gregory, the head of the village Bogucin, made a bequest on behalf of his son James, stressing twice that he is doing so by reason of his studies (*racione studii*).[67] Albert from Lubocza near Kraków wanted to secure a weekly Mass performed in the Augustinian church in Stradom (a suburb in the agglomeration of Kraków).[68] In his testament, Nicolas Byczek from Makocice included as many as three guilds and a literary brotherhood in Proszkowice, in which manner he demonstrated to the local bench members his affiliation with the urban cultural world.[69]

4. Final comments

In 1468, the highest court of the Magdeburg law in Poland, located at Kraków castle, was investigating the case of a peasant from the village of Glinik, who, at the municipal bench court in nearby Strzyżów, had bequeathed twenty marks to each of his sons: of whom two were living in the countryside, and one was a burgher. Sometime later, however, he made the will again, this time at the rural office, and reallocated some of the funds previously bequeathed to his sons for pious purposes. This was met with the opposition of his offspring, who decided to consider the first testament as the only legally valid one.[70] Obviously neither the double testament, nor the appeal to Kraków can be considered as typical actions associated with rural testamentary practices. Yet it needs to be noted that the persona of the Glinik peasant combines all characteristic features of these. The testator was connected to the urban environment, in this case by means of family, though the migration of one of his sons to the city was possibly connected to the business activity of the father. The testament written down in the register of the municipal bench was made based on an oral statement, and consisted of rather secular instructions. The following act of last will made in the countryside included a generous (as one may imagine) bequest to the Church, possibly influenced by the local priest.

The story described above presents both the possibility of the peasant to choose the place of authentication of the testament, as well as the pressure placed on the testators. As regards the second testament of the Glinik peasant, the role of

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67 WCAHR, Pułtuskie testamenta, p. 824 (1503).

68 F. Piekosiński (*ed.*), *Kodeks dyplomatyczny Małopolski*, 4, no. 1443 (1443).

69 U. Sowina, "Testament pewnego kmiecia", p. 211.

70 L. Łysiak and K. Nehlsen-v. Stryk (*eds.*), *Decreta*, no. 966: '*Sentencia de Villa Glynyk […] pater cum duobus filiis suis in villa morando ad tercium filium suum, morantem in Strzeszow, ivit et cum his tribus filiis venit sanus mente et corpore […] ad banitum iudicium, ibique requisite formam iuris, utrum sibi liceret facere cum bonis suis iuxta libitum sue voluntatis […] hocque coram banito iudicio in registrum scabinale inscribere fecit, palamque recognovit, quod cuilibet filio suo adiuvit XX marcas […] postmodum vero alium testamentum fecit in villa coram iudicio bannito, tantum pro salute anime sue, condonans ecclesiam, iuxta quod ex scriptis vestris percepimus, non tamen revocans primum testamentum in civitate factum, extunc eidem nati hoc cedere debent iuxta primam reformacionem …*'.

the priest who reminded him of the necessity to act *pro salute anime* seems to be quite obvious. Finally, the appeal made in Kraków indicates the popularity of testamentary practices, but also the restricted acceptance of records by the rightful heirs, who could argue against the clergy and their claims to the inheritance.

While in the first decades of the fifteenth century the testament was a rarity in peasant environments, in the second half of the century the popularity of testamentary practices was growing, similar to those of small towns, which are closely linked to rural facilities.[71] Still, even in the first decades of the sixteenth century writing down a will was an activity mostly chosen by the members of the elite, and even by those that were the most active and most mobile ones. In the case of peasant testators, the web of social, family, economic, and neighbourly contacts was very often crossing the formal legal boundaries. The peasants were doing business with the nobility and the burghers; they had relatives and real estate in towns. Contacting the offices and authenticating actions in writing, in rural, municipal or noble court books was nothing new to them.[72] At the same time they were tightly connected with the Church and the clergy, and the influence of the priests is clearly visible both in the decision of writing down the act of last will and in the content of these instructions.

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71 From the beginning of the sixteenth century different types of ordinances started to regularly appear, which were aimed at regulating the testamentary practices in small towns, which were the seats of rural-urban parishes. This can be confirmed *e.g.* by an ordinance for the Pabianice estate made in 1503, in which it was clearly stated that legates benefitting the Church cannot include real property such as houses and fields, but only cash and movables, including household items, cattle, horses and clothes, *E.g.* B. Ulanowski (*ed.*), *Księgi*, 2, p. 433 (1503, *Liber visitationum bonorum Pabyanycze*). Also compare: Lipnica Murowana in: www.slownik.ihpan.edu.pl; Śrem in: ibidem.

72 Mentions concerning the use of written records from town registers and registers of noble courts by the peasant testators: WCAHR, Pułtuskie testamenta, p. 824 (1511), 951 (1518).

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BETWEEN THEORY AND PRACTICE: THE LVIV MODEL OF INHERITANCE LAW IN THE LIGHT OF THE TOWNSPEOPLE'S WILLS FROM 1541-1599

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Abstract – The article attempts to approximate the inheritance law in force in sixteenth-century Lviv. It presents the content of the regulations governing the process of intestate inheritance in the discussed period. The substance of the applicable regulations was juxtaposed with wills, the provisions of which violated the applicable law in various ways. It made it possible to capture the practice of distinguishing relatives and their disinheritance by the early modern burghers of Lviv. The article presents the conditions and legal restrictions that regulated the 'non-standard' conduct of testators.

1. Inheritance law in the cities of the Kingdom of Poland

The rules for the distribution of property after death, persons counted as heirs, and the limits to free disposal of one's property are the most frequently discussed issues in the history of inheritance law.[1] The primary and irreplaceable source for those

[1] G. MACCORMACK, "Inheritance and Wergild in Early Germanic Law", *Irish Jurist* 8 (1973), p. 143-163; D. OWEN HUGHES, "Struttura familiare e sistemi di successione ereditaria nei testamenti dell' Europa medievale" ["Family Structure and Inheritance Systems in Medieval European testaments"], *Quaderni storici. Famiglia e comunità* [*Historical Notes. Family and Community*], vol. 11, 33 (1976), p. 929-952; R. E. GIESEY, "Rules of Inheritance and Strategies of Mobility in Prerevolutionary France", *The American Historical Review*, 82 (1977), p. 271-289; H. HORWITZ, "Testamentary Practice, Family Strategies, and the Last Phases of the Custom of London, 1660-1725", *Law and History Review* 2 (1984), p. 223-239; C. SHAMMAS, "English Inheritance Law and Its Transfer to the Colonies", *The American Journal of Legal History* 31 (1987), p. 145-163; G. WESENER, "Zur Geschichte des Familien- und Erbrechts. Politische Implikationen und Perspektiven" ["On the History of Family and Inheritance Law. Political Implications and Perspectives"], *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Germanistische Abteilung* [*Journal of the Savigny Foundation for Legal History: Germanistic Section*] 106 (1989), p. 432-435; Z. RYMASZEWSKI, "Trzy wyroki sądów zadwornych w kwestii prawa reprezentacji wśród krewnych bocznych w miejskim prawie spadkowym" ["Three Court Judgments on the Right of Representation among Collateral Relatives in Municipal Inheritance Law"], *Acta Universitatis Nicolai Copernici. Prawo* [*Acts of the University of Nicolaus*

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Giuliodori, "'De rebus uxoris': Dote e successione negli Statuti bolognesi (1250-1454)" ["Dowry and Succession in the Bolognese Statutes (1250-1454)"], *Archivio Storico Italiano* [*Italian Historical Archive*] 163, no. 4 (2005), p. 651-685; U. Sowina, "Testamenty mieszczan krakowskich o przekazywaniu majątku w późnym średniowieczu i we wczesnej nowożytności" ["Wills of Kraków Townspeople on the Transfer of Property in the Late Middle Ages and Early Modernity"], in: Martin Nodl (*ed.*), *Sociální svět středověkého města* [*The Social World of the Medieval City*], Prague, 2006, p. 173-183; Eadem, "Testamenty krakowskie z przełomu średniowiecza i nowożytności wobec zasad dziedziczenia według prawa magdeburskiego" ["Kraków Wills from the Turn of the Middle Ages and Modern Times in Relation to the Rules of Inheritance According to Magdeburg Law"], *Kwartalnik Historii Kultury Materialnej* [*The Quarterly of the History of Material Culture*] 58 (2010), p. 185-189; W. D. H. Sellar, "Succession Law in Scotland: a Historical Perspective", in: K. G. C. Reid, M. J. de Waal and R. Zimmermann (*eds.*), *Exploring the Law of Succession: Studies National, Historical and Comparative*, 49-66 (2007), p. 286-295; J. Beckert, "The 'Longue Durée' of Inheritance Law: Discourses and Institutional Development in France, Germany, and the United States since 1800", *European Journal of Sociology / Archives Européennes de Sociologie / Europäisches Archiv für Soziologie* 48/1 (2007), p. 79-120; J. Biancalana, "Testamentary cases in Fifteenth-century Chancery", *The Legal History Review* 76 (2008), p. 283-306; M. Mikuła, "Zakres przedmiotowy spadkobrania testamentowego w statutach litewskich" ["The Subject-of-Law Scope of Testamentary Succession in the Lithuanian Statutes"], *Krakowskie Studia z Historii Państwa i Prawa* [*Krakow Studies in the History of State and Law*] 3 (2010), p. 131-143; Idem, "Statuty prawa spadkowego w miastach polskich prawa magdeburskiego (do końca XVI wieku)" ["Statutes of Inheritance Law in Polish Cities Settled with the Magdeburg Law (until the End of the 16th Century)"], *Z Dziejów Prawa* [*From the History of Law*], vol. 7 (2014), p. 33-63; Idem, "Tradycje prawne w regulacjach testamentowych w miastach Królestwa Polskiego XIV-XVI wieku: prawo sasko-magdeburskie, prawo kanoniczne i rzymskie oraz prawodawstwo lokalne" ["Legal Traditions in Testamentary Regulations in the Cities

Crown law and Lithuanian law as codified in the three so-called Statutes of Lithuania.[2] However, these were separate legal systems, that did not affect the law applicable in cities of the Kingdom of Poland. The law of inheritance in those towns, which is the subject of this article, was regulated primarily by Magdeburg law and clarified by local laws called *wilkierz*.[3] Thus, there was not a single unified

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of the Kingdom of Poland in the 14th-16th Centuries: Saxon-Magdeburg Law, Canon and Roman law, and Local Legislation"], *Kwartalnik Historii Kultury Materialnej* [*The Quarterly of the History of Material Culture*] 68 (2020), p. 131-158; P. Suski, "Spory wokół gerady i hergewetu w polskim miejskim prawie spadkowym w XVI wieku" ["Disputes around the 'Gerada' and 'Hergewet' in the Polish Municipal Inheritance Law in the 16th Century"], in: M. Mikuła (*ed.*), *Prawo blisko człowieka. Z dziejów prawa rodzinnego i spadkowego* [*Law Close to Man. On the History of Family and Inheritance Law*], Kraków, 2008, p. 165-175; A. Sikora, "Rozporządzenia dotyczące rodziny w staropolskich testamentach szlacheckich" ["Ordinances concerning the Family in Old Polish Noble Wills"], in: J. Przygodzki and M. Ptak (*eds.*), *Społeczeństwo a władza. Ustrój, prawo, idee* [*Society and Authority. The System, the Law, the Ideas*], Wrocław, 2010, p. 393-401; J. Bieda, and A. Marciniak-Sikora, "Od szlacheckiego dziedziczenia ustawowego ku wolności testowania w Kodeksie Napoleona" ["From Statutory Inheritance of Nobility to Testamentary Freedom in the Napoleonic Civil Code"], *Studia Prawno–Ekonomiczne* [*Legal and Economic Studies*] 86 (2012), p. 11-29; P. Kitowski, *Sukcesja spadkowa w mniejszych miastach województwa pomorskiego w II połowie XVII i XVIII wieku. Studium prawno-historyczne* [*Inheritance Succession in Smaller Cities of the Pomeranian Voivodeship in the Second Half of the 17th and 18th Centuries. Legal and Historical Study*], Warsaw, 2015; M. A. McKinley, "Till Death Do Us Part: Testamentary Manumission in Seventeenth-Century Lima, Peru", *Slavery & Abolition* 33 (2012), p. 381-401; E. Kizik, "Gdańskie testamenty reciproce i praktyka tworzenia inwentarzy mienia w XVII-XVIII w." ["Reciprocal Wills in Gdańsk and the Practice of Creating Property Inventories in the 17th-18th Centuries"], *Kwartalnik Historii Kultury Materialnej* [*The Quarterly of the History of Material Culture*] 68 (2020), p. 205-222; M. Słomski, "Życie po śmierci. Wykonywanie zapisów testamentowych w kulturze prawnej i przestrzeni społecznej mniejszych miast wielkopolskich na przykładzie Dolska oraz Krzywinia i Książa (druga połowa XVI w.-pierwsza połowa XVII w.)" ["Life after Death. The Execution of Testaments in the Legal Culture and Social Reality of the Small Towns of Lesser Poland. Exemplified with Dolsk, Krzywiń and Książ (late 16th-early 17th Centuries)"], *Kwartalnik Historii Kultury Materialnej* [*The Quarterly of the History of Material Culture*] 68 (2020), p. 51-68; T. Kuehn, "Property of Spouses in Law in Renaissance Florence", in: Idem (*ed.*) *Patrimony and Law in Renaissance Italy*, Cambridge, 2022, p. 73-99.

[2] *Dobra rodowe i nabyte w prawie litewskim od XIV do XVI wieku* [*Family and Acquired Property in Lithuanian Law from the 14th to the 16th Centuries*], Lviv, 1916; J. Bardach, Statuty Wielkiego Księstwa Litewskiego – pomnik prawa doby Odrodzenia" ["Statutes of the Grand Duchy of Lithuania – a Monument of Law of the Renaissance"], *Kwartalnik Historyczny* [*Historical Quarterly*] 81 (1974), p. 750-779; M. Mikuła, "Testament publiczny i prywatny w Statutach Litewskich na tle praktyki prawnej" ["Public and Private Wills in Lithuanian Statutes against the Background of Legal Practice"], in: Idem (*ed.*), *Prawo blisko człowieka. Z dziejów prawa rodzinnego i spadkowego* [*Law Close to Man. On the History of Family and Inheritance Law*], Kraków, 2008, p. 177-193; Idem, "Z badań nad formą testamentu w Statutach litewskich: testamenty ustne i pisemne" ["On the Research on the Form of the Will in the Lithuanian Statutes: Oral and Written Wills"], *Studia z dziejów państwa i prawa polskiego* [*Studies in the History of the Polish State and Law*] 11 (2008), p. 69-86; Idem, "Statuty prawa spadkowego", p. 33-63.

[3] M. Mikuła, "Statuty prawa spadkowego", p. 33; Vide: T. Maciejewski, *Zbiory wilkierzy w miastach państwa zakonnego do 1454 r. i Prus Królewskich lokowanych na prawie chełmińskim* [*Collected 'Wilkierze' from Towns of the State of the Teutonic Order until 1454 and Towns of Royal Prussia Incorporated under Chełmno Law*], Gdańsk, 1989, p. 134-137; Idem, *Wilkierze miasta Torunia* [*Wilkierze of the City of Toruń*], Poznań, 1997, p. 68-74; D. Burdzy-Jeżowska, "'Lauda seu plebiscita'. Wilkierze XVI-wiecznego Sandomierza" ["Wilkierze of 16th-Century Sandomierz"] in:

codification of regulations governing inheritance issues in all towns incorporated under the Magdeburg law. Information on the practice of inheritance law applicable in a specific city, can be obtained from *wilkierz*, testaments, as well as from town court judgments in inheritance cases. The dispersed character of the source material makes it challenging to study the similarities and differences of rules in individual centers as well as their actual observance.

Among the various categories of sources helpful in exploring these issues, burgher wills should be distinguished as particularly valuable. They contain precise information about to whom and what the testator gives. The observance of the obligation to draw up deeds of last will in the presence of municipal authorities guaranteed those provisions' legality, acceptance, and enforceability. Comparing the legacies contained in the last wills with the local testamentary succession laws will provide information about the attitude of the municipal authorities to the observance of the law they themselves established. Were the rules scrupulously applied? Were there any limits to testamentary freedom, and if so, which? Was testamentary succession significantly different from intestate succession? Could the testators count on some flexibility of the legislators or even adjustment of the law based on an individual family situation?

In the context of this final question, it should be stressed that a last will is not only a document drawn up and edited under applicable legal and chancellery standards.[4] It also belongs to the type of ego-documents, *i.e.*, personal documents containing information about private relations in the family.[5] The order in which the heirs appear in the text, the nature of the bequests, or sometimes the mere mention or omission of a given person often reflects the testators' relationship with their

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P. GOŁDYN (*ed.*), *Miasta polskie w średniowieczu i czasach nowożytnych* [*Polish Cities in the Middle Ages and Modern Times*], Kraków, 2008, p. 201-226.

[4] Studies on the wills of Lviv and the Lviv city chancellery, vide: B. PETRIŠYSZAK, "Żadnej okazji nie opuszczę, abym do Was pisać nie miał"– korespondencja prywatna pisarza miejskiego lwowskiego Wojciecha Zimnickiego z lat 1618-1639" ["I Will Not Miss Any Opportunity to Write to You" – a Personal Correspondence of Lviv City Secretary Wojciech Zimnicki in the Years 1618-1639"], *KLIO. Czasopismo poświęcone dziejom Polski i powszechnym* [*A Journal Devoted to Polish and Universal History*] 23 (2012), p. 177-186; EADEM, "Pisarze miejscy lwowscy jako testatorzy i spadkobiercy od XIV do pierwszej połowy XVII wieku" ["The Municipal Clerks of Lviv as Testators and Inheritors from the 14th Century to the First Half of 17th Century"] *Kwartalnik Historii Kultury Materialnej* [*The Quarterly of the History of Material Culture*] 61 (2013), p. 295-304; EADEM, "Sporządzanie testamentów we Lwowie w późnym średniowieczu – pisarze, ceny, okoliczności" ["Writing Last Wills in Lviv in the Late Middle Ages: Clerks, Price, Circumstances"], *Kwartalnik Historii Kultury Materialnej* [*The Quarterly of the History of Material Culture*] 62 (2014), p. 329-336; O. WINNYCZENKO (*ed.*), *Testaments of Lviv Inhabitants from the Second Part of the Sixteenth and the Seventeenth Century. A Catalogue*, Warsaw, 2017.

[5] About the use of ego documents in research work vide: J. LEOŃSKI, "Historia wykorzystywania dokumentów osobistych w socjologii" ["History of the Use of Personal Documents in Sociology"], *Ruch Prawniczy, Ekonomiczny i Socjologiczny* [*Legal, Economic and Sociological Movement*] 57 (2013), p. 123-128; W. SZULAKIEWICZ, "Ego-dokumenty i ich znaczenie w badaniach naukowych" ["Ego-documents and their Role in Scientific Studies"], *Przegląd Badań Edukacyjnych* [*Educational Research Review*] 16 (2013), p. 65-84.

relatives. Thanks to the specificity of the acts of last will, which combine the history of a given family with the feelings and emotions of the testator within the practical application of normative acts, we obtain an irreplaceable source of knowledge of the urban legal culture.

Early modern Lviv was a unique place on the map of the then Kingdom of Poland, which is why this center, subject to Magdeburg law, became the focal point of this article. Its location on the trade routes, overall economic importance, religious and ethnic diversity, and multiculturalism meant that the customs prevailing here were in many respects different than in other hubs. The uniqueness of Lviv was also manifested in its inheritance law. It should be emphasized, that the Magdeburg law very precisely defined the manner of inheritance *ab intestato* and was a generally followed rule of inheritance without a will in the towns of the Kingdom of Poland. But not in Lviv. Lviv and Przemyśl were the only cities of the then Kingdom of Poland that issued *wilkierz* defining their own method of succession *ab intestato*. At this point it is necessary to ask the question, how having a separate, own legal system of intestate succession, affected the law of testamentary succession? In the years 1541-1599, 468 acts of last will were drawn up in Lviv and entered into four books of testaments.[6] These belonged to representatives of all strata of urban society, with a predominance of the wealthiest stratum and of men. The amount and diversity of the preserved source material are sufficient to conduct an analysis that allows to discern the inheritance rules which prevailed in Lviv.

A precise and comprehensive approach to such a complex issue as inheritance law in the Lviv variant is beyond the scope of a single article. This paper will discuss only the problem of testamentary freedom in the light of the regulations contained in the local testamentary succession laws. By analyzing the last wills in which the testator's provisions seem to contradict the above-mentioned laws, an attempt will be made to understand and find sense in the discrepancies. What was the cause? Could every citizen of Lviv make any bequests in his will? Why was it that the Lviv council decided to accept last wills that were contrary to legal practice?

2. Wills whose provisions go beyond the accepted model of inheritance

The Lviv variant of the law of inheritance was included in a batch of local laws (based on earlier Lviv regulations) established in Przemyśl and approved by Sigismund August in 1550. According to it, after the marriage, the movable and immovable property brought by both spouses were to be merged into one joint and indivisible property. The widow was entitled to one-third of the dowry, and two-thirds

[6] Lviv, Central State Historical Archives of Ukraine in Lviv (Центральний державний історичний архів України, м. Львів), Archives of the City of Lviv, Testamentary Books (henceforth: LCSHA, ACL, TB), register nos. 334, 335, 336, 338.

were due to the husband's heirs and relatives. If the wife died before the husband, the widower inherited two-thirds of the common property, the third part was considered as the maternal inheritance (*successione maternali*), that fell '*haeredibus aut consanguineis, vel proximioribus dicte vxoris sue, soexus vtriusque*'.[7] The afore-mentioned *wilkierz* determined the division of property in the case of intestate inheritance. However, the analysis of early modern testaments from Lviv shows that the distribution of goods indicated therein was also reproduced in the case of testamentary succession. The testators in their testimonies, referred to this regulation and divided their property exactly as indicated in the *wilkierz*.[8] In this type of last wills, the freedom of the testators was limited only to the precise indication of what specific movables and immovables were to go to a particular heir. It should be noted that the division of property according to the *wilkierz*, took place among all strata of the then Lviv society, not only the patricians or council's representatives. The files of the last wills, in which the testators do not follow up the monarch-established rules of inheritance from the spouse, are described in this article as 'controversial'. Stipulations of this type appear in twenty-nine wills of Lviv men and seven wills of Lviv women. Breaking away from the intestate succession usually meant giving more assets to the spouse than customarily allowed in the local testamentary succession laws. It should be emphasized that the generously endowed future widows and widowers were not the only members of the testators' family. There were other relatives, not always specified in the last will. Increasing the inheritance sum for the spouses automatically resulted in a disadvantage for other potential heirs. Why did the city authorities agree to create this type of bequests? Are the reasons for these decisions included in the last wills?

3. Distinction

Putting the testator's words in a specific notarial form gave the last will a more formal than private nature. For this reason, emotions felt towards relatives are rarely expressed directly in them. Vocabulary that conveys feelings or justifies specific decisions occasionally appears, but it is rare. For this reason, it seems extremely interesting that in all acts of last will in which an attempt was made to increase the spouse's inheritance, we can find expressions of feelings and references to shared

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7 M. Mikuła, "Statuty prawa spadkowego", p. 50.

8 Wills containing the testator's reference to the Lviv inheritance law vide among others: LCSHA, ACL, TB, register no. 334: Anna Culchanek, p. 87-88, Grzegorz Glarz, p. 55-63, Marcin Łojek, p. 177-122, Mateusz Gnidka, p. 291-292, Sebastian zwany Sobek, p. 261-262; LCSHA, ACL, TB, register no. 335: Anna Dunajowska, p. 415-419, Anna Erasmusowa, p. 290-292, Barbara Felixowa, p. 719-722, Krystyna Sykstówna, p. 613-616, Elżbieta Kinostowa, p. 181-182, Jan Nadolski, p. 631-635, Jan Czupilo, p. 579-584, Jan Marszolcowicz, p. 487-488; LCSHA, ACL, TB, register no. 338: Andrzej Kobierczyk, p. 31-36, Anna Cyganka, p. 85-87, Anna Piękoszowa, p. 252-253, Antoni Wilth, p. 89-92, Daniel Stefanowicz, p. 257-259.

lives that are not usually found in wills. While this emotional vocabulary is quite schematic and sparing with words, it can be divided into two types.

The first is to acknowledge the qualities of wives. In nineteen of the twenty-nine wills of men discussed here, there is information about the wife's obedience, both in health and in sickness.[9] There is no reason to consider that these statements were accidentally or even thoughtlessly entered by the public notary. They are certainly not part of the notarial form. 'Obedient' is also not the usual term for a married woman. Why, then, put those kinds of statements in wills? The simplest answer is that, despite such a schematic approach, it was the initiative or intention of the testators themselves. These somewhat rigid praises may be an example of adapting the testator's words and emotions to the requirements of an official document. The testator's intent could have been to highlight a successful marital life, to show appreciation for his wife, to indicate that the woman with whom he became involved met the requirements set for her as a wife, and to praise her for it. However, since the act of last will is not the best place for expansive descriptions of emotional states, public notaries could standardize, shorten and adapt the words of the testators so that they fit the nature of the document being prepared. This tactic almost wholly deprived them of their personal character. Now it is impossible to discover from them in what difficult situations the wife stood by her husband and what manifested her devotion and obedience. Those sources do not allow us to fully understand what the testator had in mind or whether illness and unfavorable times affected this marriage.

In addition to the above-mentioned 'devotion and obedience', the sixteenth-century Lviv citizens, in their acts of last will, drew attention to one more feature of their wives, namely their perseverance, or rather their contribution to the economic status of the family. Three testators emphasized in their last will that the wealth they had accumulated during their lifetime was the result of both their own work and their spouse's contributions.[10] This is definitely a more personal confession, more precise than the ambiguous "fidelity in difficult times." Appreciation of industriousness and recognition of a woman's contribution to building a shared property is associated with showing respect for the spouse. To some extent, at least in this economic dimension, the husband puts her in the position of his "partner."

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[9] LCSHA, ACL, TB, register no. 335: Michał Kiślisz, p. 51-54; Melchior *cirurgus*, p. 79-81; Adam Wolf, p. 165-171; Paweł *portulanus*, p. 409-413; Jan Mordulka, p. 439-442; Walenty Handzel, p. 743-745; LCSHA, ACL, TB, register no. 338: Wojciech Zaboklicki, p. 3-6; Jakub *pistor*, p. 25-28; Mikołaj Sowicz, p. 42-45; Sebastian Torunka, p. 63-64; Mateusz Socha, p. 69-73; Steczko Zienkowicz, p. 73-75; Szymon Kołodziejczyk, p. 75-76; Mateusz *braseator*, p. 107-108; Stanisław *balneatoris*, p. 129-130; Andrzej Sinicki, p. 136-138; Jan Dudkowicz, p. 207-209; Mikołaj Namysłowski, p. 209-211; Mateusz Bydłowski, p. 250-252.

[10] LCSHA, ACL, TB, register no. 335: Stanisław Hanel, p. 501-510; LCSHA, ACL, TB, register no. 338: Szymon Kołodziajczyk, p. 75-76; Andrzej Sinicki, p. 136-138.

The sixteenth-century testaments of the Lviv townspeople showed broadly understood devotion and diligence, which were immortalized as features worthy of respect and distinction. However, those acts of last will also perpetuate examples of directly expressed love, not justified by any special features of a woman. In seventeen of the wills, men referred to their spouses as beloved wives, and their praises for wives mentioned lasting *marital love*.[11] In general, *honesta* was a common way to refer to the wife, while the use of the word *charissima* goes beyond the usual characterization of a wife. It is difficult to consider its use and recording by the city notary as accidental or random. It can be assumed that the testators, attesting to the provisions of their last will, have spoken in this way about their wives and their marriage.

In the testaments cited here, men, invoking the virtues of their wives, their assistance, and the love that binds them, try to guarantee them more than what the local intestate succession laws ensure for them or even try to transfer all their possessions to them. Thus, the husband's sentiments towards his wife, immortalized in the act of last will, fulfill a specific function. They are an argument and justification for extending the wife's share in the inheritance. Those kinds of testaments were actually registered. They were written under the council's control and authenticated by the same council. It seems that the city authorities allowed the testators considerable freedom, but this happened under certain conditions. As it has already been noted, assigning a greater part of the property to the wife automatically reduced the afore-mentioned two thirds of the property attributable to the man's relatives. In two wills, there is a direct request to relatives to respect the testator's last will and not protest the conditions of his will.[12] In another case, relatives received some amount of money, which was closer in terms of abundance to a symbolic legitim than to two thirds of the estate owned by the testator.[13] It seems, therefore, that the council was willing to allow some space for the individual decisions of the testator, regardless of his position in the social hierarchy, provided that it did not cause conflicts over the inheritance. Conjugal love, emphasizing the work and virtues of the wife, was supposed to be an argument to convince not so much the legislators as the

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[11] LCSHA, ACL, TB, register no. 335: Michał Kiślisz, p. 51-54; Adam Wolf, p. 165-171; Jan Marszolcowic, p. 487-489; Jaczko Mosierowicz, p. 755-758; LCSHA, ACL, TB, register no. 338: Wojciech Zabokliczki, p. 3-6; Franciszek Jakubowski, p. 17-23; Mateusz Socha, p. 69-73; Steczko Zienkowic, p. 73-75; Szymon Kołodziejczyk, p. 75-76; Rafał Mieszkowski, p. 146-148; Iwan Terech, p. 189-190; Jan Dudkowicz, p. 207-209; Mikołaj Namysłowski, p. 209-211; Paweł Krauz, p. 216; Daniel Stefanowicz, p. 222-225; Jakub Małek, p. 254-255; Mateusz Hidbala, p. 255-257; Wojciech *caerefrixoris*, p. 261-263.

[12] LCSHA, ACL, TB, register no. 338: Paweł Krauz, p. 216: '*małżonkę moię miłą Dorothe czynie doziwotnią Panią y roskazicielką moich dwoch częsci które po mnie zostaną a dzieci niechai się nad nią niekwilą*'; Andrzej Sinicki, p. 137: '*Braciei tesz mei proszę aby mei żenie pomienioneii zadnei krzywdy ii bezprawia nie czynilo*'.

[13] LCSHA, ACL, TB, register no. 335: Mateusz *breaseator*, p. 108: '(…) *alienans ab his bonis omnibus et singulis suos propinquos et amicos, quibus utique pro contentione eorum legavit quatuor florenos*'.

man's relatives to respect the testator's last will.[14] What is important, in the council books, from the period corresponding to the Book of testaments, no judgments or other traces were recorded that would indicate that the council dealt with conflicts regarding acts of last will. It is not known, whether the decisions were not recorded or whether the council had no basis for initiating legal proceedings. It should be emphasized that one defective bequest did not invalidate the entire will. Demonstrating its irregularities led to the deletion of the provision or its remodeling in accordance with adopted regulations. Therefore, research on judicial disputes with regard to last wills in Lviv in the sixteenth century is difficult.

At this point, the problem of freedom of testators in Lviv returns once again. It is worth noting how it was shaped in other cities of the Kingdom of Poland founded on the Magdeburg law. In 1530, a *Wilkierz* was issued in Kraków, which confirmed that the testators were free to dispose of all their goods in their last will, provided that they were not immovables.[15] It is known that this law was copied by other cities of the Kingdom of Poland.[16] Was it also adopted by Lviv? This cannot be ruled out or unequivocally confirmed. Consecutively, the afore-mentioned *Wilkierz* of Lviv does not specify, what should happen, when the provisions of the will are inconsistent with the law of *ab intestato* succession. However, it is likely that, as in other towns of the Kingdom of Poland, the *ius propinquitatis* was in force in Lviv.[17] In the *Sachsenspiegel*, it was clearly stated that without the consent of the heirs, no one can "remove his goods from himself", and if someone decides to take such a step, his heirs have the full right to apply to the court to demand the return of unlawfully transferred property.[18] The application of the *ius propinquitatis* in sixteenth century Lviv is also only a hypothesis. The lack of surviving court judgments does not allow to confirm it.

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[14] In the few wills of the sixteenth century Lviv townspeople, consents of natural heirs to controversial records were recorded. It should be emphasized that in the wills discussed above the confirmation was not recorded. This, of course, does not mean that it had not been expressed.

[15] K. Mecherzyński, *O magistratach miast polskich a w szczególności miasta Krakowa* [*About the Magistrates of Polish Cities, in particular the City of Kraków*], Kraków, 1845, p. 199-211; B. Groicki, "Tytuły prawa majdeburskiego" ["Titles of the Magdeburg Law"], ed. K. Koranyi, Warsaw, 1954.

[16] K. Bukowska, *Orzecznictwo krakowskich sądów wyższych w sporach o nieruchomości miejskie (XVI-XVIII w.). Studium z historii prawa rzymskiego w Polsce* [*Jurisprudence of Krakow's Higher Courts in Disputes over Municipal Real Estate (16th-18th Centuries). A Study on the History of Roman Law in Poland*], Warsaw, 1967.

[17] Z. Rymaszewski, *Prawo bliższości krewnych w polskim prawie ziemskim do końca XV wieku*, [*The Right of Proximity of Relatives in Polish Land Law until the End of the 15th Century*], Wrocław, Warsaw, Kraków, 1970, p. 172-172, 183-187.

[18] '*Absque heredum consensu et absque iudicio legali nemo suum proprius nec suos homines dare potest*'; J. Łaski, *Commune Incliti Poloniae regni privilegium constitutionum et indultuum publicitus decretorum approbatorumque*, Kraków, 1506, part. 2, p. 209r-209v; '*ane erven gelof […] ne mut nieman sin egen […] geven*', vide: K. Koranyi, "Podstawy średniowiecznego prawa spadkowego" ["Basics of Medieval Inheritance Law"], *Pamiętnik Historyczno-Prawny* [*Historical and Legal Diary*] 9, 1930, 2, p. 117.

Does the immortalization of emotions and feelings towards the husband also have a similar application in women's last wills? In each of the seven wills in which there is an expressed desire to extend the husband's share in the inheritance, we can also find emotional language and attention to the spouse's qualities.[19] Similarly, as in testaments belonging to men, the point was to transfer all property to the spouse or to extend the monetary endowments. Interestingly, there is no clear distinction between the characteristics of a good husband and a good wife. Both sexes invoke obedience and devotion to the spouse and marital love. It should be noted that in the case of the will written by females, there was no request to relatives to respect the testator's will. There is also no information about protesting the will by dissatisfied relatives. It is doubtful that this is due to the fact that the last will of women was given more respect than the last will of men. This could instead be explained by a slimmer representation of women's wills in the source material.

The above-mentioned documents of last will, through the division of assets proposed in them, resemble mutual agreements between spouses whereby the spouse that outlives the other takes all goods and whereby all relatives and in-laws are excluded from the inheritance. So, were they treated in this way by the city council, as a testament and a contract in one? Was that the legal basis for their approval? It should be emphasized that in Lviv, spouses could bequeath their entire property to each other only if they had no children. Among the early modern wills of the Lviv townspeople, only one act of last will has been preserved in which the testator refers to an earlier contract of annuity entered into with her husband.[20] In it, the woman uses exactly the same reference to love for her husband as in the acts of last will cited above. Although unique in its content, this last will is another element in the discussion on the connection of expressed feelings, emotions, and the experience of living together with the legally controversial property division.

4. Ingratitude

Equally interesting as wills containing legacies that increase the spouse's estate are those that seem to seek to deprive them of it. There are six preserved acts of last will in which the testators complained about physical violence by their husbands and/or economic violence, *i.e.*, wasting the joint property, stealing the woman's belongings, or condemning the woman to suffer poverty.[21] Three of them are

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19 LCSHA, ACL, TB, register no. 335: Krystyna, żona Tomasza, p. 613-616; Katarzyna Sokołowska, p. 645-649; Agnieszka Modetczyna, p. 687-689; LCSHA, ACL, TB, register no. 338: Anna Cyganka, p. 85-87; Ewa Namysłowska, p. 139-141; Katarzyna Skrzypkowa, p. 225-226; Anna Piękoszowa, p. 252-253.

20 LCSHA, ACL, TB, register no. 334, p. 179-182: '*Anna*, *uxor Joannis pannitansoris*'.

21 LCSHA, ACL, TB, register no. 338: Jadwiga, p. 59-61: testifies that she suffered poverty and infertility with her second husband; Anna Organiścina, p. 83-85: accuses her husband of theft and severe beating; Katarzyna Bartoszowa, p. 115-116: testifies, that she was severely flogged by her

particularly interesting. The testament of Agnieszka Mozgowcowa (1593), a citizen of a suburb of Lviv, contains a testimony that the wounds caused by her husband beating her were the reason of her expected death:

> '*Naprzod opowiadam się isz s tego swiata idę nie dla czego inszego, ieno że mnie maz mui był zbił przed brzemieniem u oiica w domu, kiedy go doma niebyło, od którego czasu zawszem chyrlała asz po dzis dzień*' ('Firstly, I announce that I am leaving this world for no other reason than the fact that my husband beat me at [my] father's house when he was not at home, from which time I have always coughed to this day').

In addition, the woman asks that her husband be deprived of the right to take care of their son and demands that in the event of the child's death, Agnieszka's husband should not inherit after the boy.[22] Both as the guardian and the potential heir after the child, the woman points to her father.[23]

In the next one, belonging to Anna Organistyna (1586), apart from the information that her adult son had already received his share of the inheritance there are no other financial instructions. One can get the impression that the last will itself is a kind of indictment against the second husband, Jakub. The woman testified that he took the musical instruments she inherited from her first husband and that he also used physical violence against her.[24] Whether Anna linked being beaten by her husband during her illness with bringing her to a state of agony is difficult to say unequivocally.

The third act of last will worth mentioning is the one belonging to Katarzyna Bartoszowa, drawn up in a house for the poor at the Holy Spirit church.[25] The woman was Bartholomew's childless widow and the current wife of Jan, the shoemaker. The act of last will itself begins with a description of her mutilated body full of wounds and tumors of various colors, which, as Katarzyna testified, resulted from the flogging by her husband Jan.[26] This confession is followed by very standard legacies regarding the payment of a woman's debts and devotional records. The

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husband; Agata Grabcowa, p. 160-161: testifies, that she received nothing from her husband and she suffered poverty with him Agnieszka Morgowcowa, p. 167-168: accused her husband of bringing her to a state of agony; Anna Rybarka, p. 226-228: accuses her husband of wasting and losing everything that they had.

22 LCSHA, ACL, TB, register no. 338, p. 168: '*Gdyby zaś na dziecię moię na Stasia Pan Bog smierć przepuscił, tedy spadek po dziecięciu proszę aby oycu memu był oddany za iego dobrodzieistwa co mi teraz czyni ii przed tym czynił*'.

23 Ibidem: '*A opiekuna dzieciu swemu mianowała oyca swego, ktorą opiekę on przyiął*'.

24 Ibidem, p. 85: '*Postremo recognovit quod se ex hac vita decesserit, se decedere a manibus eiusdem mariti sui Jacobi a quo existens iam in morbo graviter percussa est*'.

25 Ibidem, p. 112: '(…) *in domo pauperum ad Ecclesiam Sancti Spiritus in civitate Leopoliensi sita* (…)'.

26 Ibidem: '*In primis commonstravit ipsis non sine effusione lachrymarum et gravi dolore, corpus suum ex omniparte lividum et fulvum, quas lividi et fulvi coloris ma<cu>las se contraxisse ex verberibus sibi a moderno marito suo Joannis sartore genibus illatis asserebat*'.

place where the act of last will was drawn up is very interesting and unique. This is probably the only surviving record written in this type of place among the early modern testaments of the inhabitants of Lviv. The poor or beggars who took refuge in hospitals or homes for the poor did not make last wills because they had no property to distribute. Katarzyna was not a beggar with no fortune. So why was she in a home for the poor? Was she there seeking medical help, shelter from her husband, or both? Perhaps it is the place where the last will was made that is responsible for a relatively detailed description of Katarzyna's condition. The vast majority of the sixteenth-century files of last will would only briefly inform that the testator was of sound mind but sick in the body without providing any information about the illness. The detailed description of the testator's health in Katarzyna's case resembles a forensic examination combined with identifying the perpetrator. Flogging, which, according to the woman's testimony, was the source of her wounds and suffering, brings to mind not an attack of passion but a planned and measured punishment.

It is necessary to underline that in none of these acts of last will was there an explicit request to limit the husband's share in the inheritance. It is significant, however, that the spouses of these women are mentioned in their wills only in the context of regret and complaints about living with them. The information about the transfer of a part of the property established by the city council laws, which is a standard feature of the last will, was not included. They were omitted as heirs. Of course, this part of the property belonged to them by law, and theoretically, there was no need to write it down in the last will – despite this, the people of Lviv consistently did so. A lack of such a mention is, therefore, a questionable anomaly. Perhaps, just as a successful marital life and marital love expressed in the acts of last will were an argument explaining the decision to extend the inheritance to the spouse, so the directly expressed regret and tragedy of the failed marriage could also have some impact on the future of the estate? An attempt to understand the last wills of women who were victims of violence requires a multithreaded analysis.

Firstly, it should be highlighted that physical violence against the wife during the period under review was acceptable.[27] The husband had the right, if not the duty, to punish his wife physically. A man also had much broader powers to dispose of marital property freely. However, the testimony of the testators cited shows that their spouses overextended their powers. A wife had the right to dispose of her personal belongings, the so-called "peripheries" such as clothes or ornaments, and she also had home furnishings, such as kitchen utensils. By selling those goods, the husbands simply robbed their partners. Physical violence itself undoubtedly existed

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[27] S. Butler, *The Language of Abuse. Marital Violence in Later Medieval England*, Leiden, 2007, p. 25; M. Binaś-Szkopek, "Pulcre et leviter? O przemocy wobec żon i o próbach jej ograniczania w kościelnych źródłach sądowych XV w." ["On Violence Against Wives and Attempts to Limit it in Ecclesiastical Court Sources from the 15th Century"], *Przegląd Historyczny* [*Historical Review*] 3 (2020), p. 487-488.

and was tolerated. However, one cannot undervalue that consistory books are filled with women's complaints about spousal violence.[28] Women did not accept beatings; they did not agree to someone inflicting wounds on them. Typically, cases of physical violence ended with a warning to the aggressive party and a recommendation to live in harmony, which nevertheless indicates that the physical punishment of the wife had its legal limits.[29] Causing severe and numerous injuries to the wife's body or finally beating her to death would be considered as crossing these limits. But were there any real consequences for the spouses – perpetrators of violence?

It is not easy to find a clear answer to this question. Bożena Popiołek, in her article on a criminal case in court records, cites a lawsuit by priest Marcin Mirzwiński against Antoni Szpiczak (1742!) for beating his wife to death.[30] The alleged murderer, however, is not to be held responsible for the crime committed but is on trial for refusing to pay the sum owed to the priest for nursing his mortally wounded wife during her agony. The case took place in the middle of the eighteenth century in Stanisławów, so it is not the best comparative source for research on the legislation of sixteenth-century Lviv. It can, however, indicate what steps were taken (or not taken) against the perpetrators of domestic violence. If, in early modern Lviv, the murderers of their wives were not regularly held criminally responsible for their actions, the aspirations of the testators to take any consequences against their torturers, even financial ones, would become all the more understandable.

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28 "Sprawy małżeńskie w oficjalacie okręgowym w Lublinie w XV wieku" ["Matrimonial Affairs in the District Officialate in Lublin in the 15th Century"], *Roczniki Teologiczno-Kanoniczne* [*Theological and Canonical Annals*] 17 (1970), p. 27-44; A. Roberts (*ed.*), "Violence against Women in Medieval Texts", Florida, 1998; M. Delimata, "Wiarołomni mężowie przed polskimi sądami kościelnymi" ["Perfidious Husbands before Polish Ecclesiastical Courts"], *Nasza Przeszłość* [*Our Past*] 104 (2005), p. 247-258; M. Kołacz-Chmiel, '*Mulier honesta et laboriosa'. Kobieta w rodzinie chłopskiej późnośredniowiecznej Małopolski* [*A Woman in a Peasant Family of Late Medieval Lesser Poland*], Lublin, 2018; M. Binaś-Szkopek, "Małżeńska przeszkoda impotencji i oziębłości płciowej w świetle akt poznańskiego konsystorza z XV wieku" ["The Impediments of Impotence and Frigidity in the Light of Records of the Poznań Consistory in the 15th Century"], *Kwartalnik Historii Kultury Materialnej* [*The Quarterly of the History of Material Culture*] 126 (2019), p. 269, 272, 275; Eadem, "Pulcre et leviter?", p. 485-514.

29 B. Lesiński, *Stanowisko kobiety w polskim prawie ziemskim do połowy XV wieku* [*The Position of Women in Polish Land Law until the Mid-15th Century*], Wrocław, 1956, p. 105, 109; S. Biskupski, *Prawo małżeńskie Kościoła Rzymskokatolickiego* [*Marriage Law of the Roman Catholic Church*], part 1, Warsaw, 1956, p. 216; W. Brzeziński, "Historii małżeńskich kilka z piętnastowiecznych wielkopolskich kościelnych akt sądowych" ["Several Marriage Histories from the 15th-Century Greater Poland Church Court Records"], in: I. Błaszczyk and J. Jundziłł (*eds.*), *Domus et familia: ideały i realia życia rodzinnego* [*Ideals and Realities of Family Life*], Bydgoszcz, 2000, p. 85-92; C. Donahue, *Law, Marriage, and Society in the Later Middle Ages: Arguments about Marriage in Five Courts*, Cambridge, 2007, p. 18-33; W. Góralski, "Przeszkoda występku" ["The Impediment of Vice"], in: Idem (*ed.*), *Przeszkody małżeńskie w prawie kanonicznym* [*Marriage Impediments in Canon Law*], Warsaw, 2016, p. 349-387.

30 B. Popiołek, "Kryminalia w księgach sądowych miast Korony jako źródło do badań nad życiem rodzinnym na przełomie XVII i XVIII w." ["Criminal Cases in Court Books of Polish Towns as Sources for Studying the Family Life at the Turn of the 18th Century"], *Kwartalnik Historii Kultury Materialnej* [*The Quarterly of the History of Material Culture*] 66 (2018), p. 28.

The question that should be asked is whether the Lviv variant of the inheritance law provided the possibility of excluding the closest family members from the inheritance. In the event of any protests by the omitted relatives, did the council invalidate the controversial provisions, or did it recognize the arguments of the testators and uphold their will? The will of Barbara, the widow of Mateusz Czarny, is consequential in answering the questions above.[31] The afore-mentioned act of last will was entered into the Council Book as an appendix to the judgment on recognizing its validity. The testator transfers all her property to her daughter Agnieszka and her husband Wawrzyniec in exchange for caring for her.[32] She leaves nothing to his older daughter, Anna, because of the mean words and physical violence she was supposed to commit against her mother.[33] The council recognized the act of last will as valid, which happened despite the protest of Szymon, Anna's spouse, deprived of the inheritance.[34]

The will of Barbara, the widow of Mateusz Czarny, and the judgment confirming it proves that the Lviv variant of inheritance law allowed the omission of a member of the closest family in the last will. It seems, therefore, that the testators who did not name their spouses as heirs due to the wrongs suffered by them could also count on respecting the decisions testified before the council. It seems to be of crucial importance for the acceptance of such a decision by representatives of the municipal authorities that it should be included in the will. Barbara and the other women pointed to many unacceptable behaviors committed against them by the omitted heirs.

Searching for answers about the functioning of modern inheritance law in Roman law codes is risky. Medieval and early modern wills, although having the Roman version as a predecessor, evolved into forms dissimilar to the original.[35] However, it is difficult to ignore the similarities between the way in which relatives are omitted in the wills of Lviv townspeople cited here and Novella 115 of the Justinianic Code. It allowed for the disinheritance of a relative, even without securing their share, provided that the reasons for such a decision, *i.e.* the reasons for ingratitude, were demonstrated in the last will.[36] Was the ability to omit relatives

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31 CSHA, ACL, City Board Book (hereafter: CBB), register no. 16, p. 231.

32 Ibidem: '*Item Agnyszcze dziwcze swoiej młodszej i Wawrzynczowi mężowi iej a zięciowi swemu za ich opatrowanie które koło niej czynili za zdrowia i czasu choroby i za pilne a stateczne ich posługi koło domostwa wszystkiego odkazała i darowała* (…)'.

33 Ibidem: '*A na Annę dziwkę starszą załowała się przed tymisz starszemi iako przed urzendem ze od niej często cierpiała zle słowa i łazganie rąk iej przeciwko sobie*'.

34 Ibidem: '(…) *debet in suo robore permanere non obstante inpugnatione et contradictione providi Simonis privigni Phili et Annae coniugis eiusdem ergo matrem suam praefatam, uti recognitio illius testatur non bene promeritae. Testamenti autem tenor sequitur et est talis*'.

35 H. Manikowska, "W poszukiwaniu źródła 'totalnego'. Najważniejsze kierunki badań nad testamentami ludności miejskiej w XIII-XVIII w." ["In Search of a 'Total' Source. The Major Lines of Research on City-dwellers' Testaments in the 13th-18th Centuries"], *Kwartalnik Historii Kultury Materialnej* [*The Quarterly of the History of Material Culture*] 68 (2020), p. 31.

36 S. Kursa, "Forma wydziedziczenia w prawie justyniańskim" ["Form of Disinheritance in Justinian Law"], *Czasopismo Prawno – Historyczne* [*Legal and Historical Journal*] 63 (2011), p. 91-92.

due to their unacceptable acts towards the testator directly adopted from Justinian's regulations, or did the inspiration for its use come from another urban center? When did such solutions start to be used in Lviv? Was the above-mentioned ingratitude of the relatives towards the testator thoroughly explained, or was its interpretation left to the representatives of the municipal authorities? It is not easy to give an unambiguous answer to these questions. At this point, it should be noted that Lviv is not the only center where such traces of the reception of Roman law can be found. Regulations concerning the issue of legitim and disinheritance were put in order in Poznań's local law code in 1598.[37]

It is also interesting that the omission of family members who have committed offenses against the testator appears only in the acts of last will of women from the lower strata of urban society. Representatives of all strata of Lviv at that time sought to extend the scope of the spouse's inheritance as determined by the local inheritance archives. The number of last wills containing an example of omitting a relative is minimal, which may explain the lack of other representatives of the sixteenth-century Lviv society. On the other hand, the possibility that this type of legal solution was primarily used only by poorer townspeople fits perfectly into the image of the then-urban society, which is also reflected in other source materials from the era. Patrician families resolved marital and property conflicts among themselves. First of all, they minimized the risk of their occurrence by writing down prenuptial agreements, hence their minimal representation in consistory or criminal records. The lack of signs of conflicts, mutual accusations, and opposition of relatives in the wills of this social group should not be surprising. Subsequently, a man, even of a lower class, complaining about the wrongs suffered by his wife or descendants exposed himself to the loss of his good name in the patriarchal society. Female aggression was less likely to go beyond the house walls because it was not befitting for a man to admit submission.[38] Given this, it is understandable that lower-born women resorted to such measures to discipline and punish oppressive family members.[39]

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37 K. Bukowska, *Orzecznictwo krakowskich sądów wyższych*, p. 99-100; M. Mikuła, "Tradycje prawne w regulacjach testamentowych w miastach Królestwa Polskiego", p. 149. It was not possible to confirm, whether the provisions known from Novella 115 influenced the jurisprudence of the courts in Kraków, vide K. Bukowska, *Orzecznictwo krakowskich sądów wyższych*, p. 99; K. Justyniarska-Chojak, "Wydziedziczenie w testamentach mieszczańskich z województwa sandomierskiego (w XVI-XVII wieku)" ["Disinheritance in Burghers' Wills from the Sandomierz Voivodeship (in the 16th-17th Centuries)"], *Almanach Historyczny* [*Historical Almanack*] 11 (2009), p. 17-20; M. Mikuła, "Tradycje prawne w regulacjach testamentowych miast Królestwa Polskiego", p. 145.

38 B. Popiołek, "Kryminalia w księgach sądowych miast Korony", p. 27.

39 About the wills as the disciplining tool and the cause of conflicts in family, vide. W. Zielecka, "Prawo i praktyka testowania w Wielkim Księstwie Litewskim w XVI i XVII wieku" ["Testamentary Law and Practice in the Grand Duchy of Lithuania in the 16th and 17th centuries"], *Czasopismo Prawno-Historyczne* [*Legal and Historical Journal*] 61 (2009), p. 83-89; M. Wilczek-Karczewska, ""Konflikty rodzinne na tle majątkowym w świetle wielkopolskich inwentarzy i testamentów z XVII wieku. Zarys problematyki" ["Family Conflicts related to Property in the Light of Inventories and Testaments from the 17th Century in Greater Poland. Outline of the Problem"], in: I. M. Dacka-

5. Venality

The last wills of Lviv townspeople show that, in justified cases, representatives of the authorities were willing to tolerate last wills with a controversial division of property, *i.e.* a different one than that provided for by intestate succession law. However, the files of the last will cited so far in the article indicate that this was within the framework of testamentary freedom, applicable law or the testator private arrangements with his relatives. However, the testament of Zygmunt (1551), mayor of Kulików, suggests that there was also another way to obtain acceptance for the special provisions of the last will.[40] In his testimony, the man informs that Małgorzata, with whom he lived, was not and had never been his wife, and their relationship was a type of adultery.[41] Moreover, according to Zygmunt's will, the woman was married to an individual named Bistrkowski.[42] Despite the declaration explaining their relationship status, Kulików's mayor calls his mistress's daughter a stepdaughter: *testatoris privigna ipsa*, a term reserved for *pueri legitimi*, the wife's or husband's legitimate children from a previous marriage. The girl, whose name is unknown, inherits from her mother's partner robes made of valuable materials, everyday textiles, and elements of home furnishings.[43] Why did representatives of the municipal authorities recognize and respect Zygmunt's adoption of a daughter

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GÓRZYŃSKA and A. KARPIŃSKI (*eds.*) *Społeczeństwo a rodzina. Społeczeństwo staropolskie. Seria nowa* [*Society and Family. The Old Polish Society. New Series*], vol. 3, Warsaw, 2011, p. 149-169; N. BIŁOUS, "Konflikty w rodzinach mieszkańców miast Wołynia w świetle testamentów z XVII wieku" ["Family Conflicts in Volhynian Towns in the Light of Testaments from the 17th Century"], *Kwartalnik Historii Kultury Materialnej* [*The Quarterly of the History of Material Culture*] 61 (2013), p. 317-325; K. MROZOWSKI, "Spór o spadek y o ymienye a kultura prawna mieszkańców Starej Warszawy w połowie XVI wieku" ["Dispute over Inheritance and Property, the Legal Culture of the Inhabitants of Old Warsaw in the Mid-16th Century"], *Kwartalnik Historii Kultury Materialnej* [*The Quarterly of the History of Material Culture*] 61 (2013), p. 277-294; J. WYSMUŁEK, "Testamenty jako narzędzia władzy. Wnioski z analizy późnośredniowiecznych krakowskich testamentów" ["Last Wills as Instruments of Power. Conclusions from an Analysis of Late-Medieval Kraków Last Wills"], *Kwartalnik Historii Kultury Materialnej* [*The Quarterly of the History of Material Culture*] 69 (2021), p. 19-37.

40 LCSHA, ACL, TB, register no. 334, p. 101-104; Kulików, a settlement located in the Żółkiew region on the Kulikówka river.

41 For the source edition and analysis of Zygmunt's testament, see: M. KNAJP, "Wyznania cudzołożnika. Testament lwowskiego prawnika Zygmunta (XVI w.)" ["Confessions of an Adulterer. The Testament of the Lviv Lawyer Zygmunt (16th Century)"], *Kwartalnik Historii Kultury Materialnej* [*The Quarterly of the History of Material Culture*] 71 (2023), p. 19-36.

42 LCSHA, ACL, TB, register no. 334, p. 102: '*Item idem testator reconovit et protestatus est, quia Margaretha cum qua ipse commansit non est neque aliquando erat uxor ipsius legittima eo quod ipsa habens priorem maritum suum Bistrcofski legittimum ipso necessitate cum eadem testator adulterine vixit et commansit*'.

43 Ibidem, p. 103: '*Item etiam de vestibus aestivalis duo: alterum de czamloto alterum de forstat. Item 3 estivalia de kitaika. Item unum estivale de muchayer. Item subductas duas de czamlotis alterum nigri, alteram dzikye coloris muliebras. Item subductam virilem wlpeam, lectisternia vestes albas, coldram camchatam valoris florenorum 12. Item 2 lodices, mitram axamiteam. Item 2 equos cum curru et alia plura. Que omnia filie sue, prefati testatoris previgne ipse extradidit, quibus rebus prespecificatis et aliis obmissis per ipsam receptis eandem contentadit*'.

who was a stranger to him in the eyes of the law? Perhaps the girl had been under the care of her mother and Zygmunt for so long that the news about the lack of legalization of their relationship did not discredit the right to a parental bond between the child and the unofficial stepfather. This would be an interesting example of adapting the law to the testator's family situation. Representatives of the city authorities who watched over the legality of the bequests, in the case of Zygmunt, showed a great deal of understanding, preferring emotions and family ties to formal considerations. However, one may have doubts whether they did it only out of empathy for the testator. The mayor of Kulików, in his act of last will, bequeathed sixteen zlotys to the city of Lviv.[44] The wills of representatives of Lviv's urban elite rarely contain such entries, interpreted as an expression of local patriotism and a desire to contribute to the community.[45] There is no reason to discredit Zygmunt's attachment to Lviv. However, considering the content of his last will, it seems that the sum was a fee for the councilors to recognize the controversial document. Among the wills of the Lviv townspeople, no other has survived in which the testator would admit to adultery. Unfortunately, this means that it is impossible to make any comparisons or trace the attitude of the Lviv city authorities to such unions in practice. It is unclear whether Zygmunt's situation was unique and aroused understanding and acceptance or whether Lviv should be considered a city distinguished by its leniency and moral liberalism, at least for those who could afford it.

6. Conclusions

The regulations of the inheritance law in Lviv, known from the Przemyśl *wilkierz*, yielding one third of the property for the wife and two thirds of the property for the husband and his relatives, were the observed pattern of property division in most of the sixteenth-century Lviv wills. However, the acts of last will cited in this article indicate that in certain circumstances, the city authorities were accepting last wills that deviate from this accepted practice of law, because of the individual family situation of the testators.

Successful marital life, the wife's contribution to the family's economic situation, care, and mutual love were used as arguments for extending the spouse's inheritance. At the same time, there was no single pattern of how such an increase in inherited property looked exactly. The testators sought either to make the spouse

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44 LCSHA, ACL, TB, register no. 334, p. 102: '(…) *in primis marcas decem pro Re Publice Civitatis istius dandos legavit*'.

45 Cf. J. Wysmułek, "Testament jako narzędzie władzy", p. 32; In the Book of Wills from the years 1541-1599, apart from Zygmunt, only three testators decided to transfer part of their property to the municipal community. It should be emphasized that none of them belonged to the group of representatives of the municipal authority: Marcin Łojek: 10 *florenos* (CSHA, ACL, TB, register no. 334, p. 117-122); Jan Handzlowicz: 30 *florenos* (CSHA, ACL, TB, register no. 334, p. 191-195); Maciej Gnidka: 20 *florenos* (LCSHA, ACL, TB, register no. 334, p. 291-293).

the sole heir, to transfer all property to them for life, or to extend the due one third or two thirds of the goods with sums of money or other valuables. In addition to justifying the decision to give the partner an additional endowment, other relatives played a critical role in the process of extended inheritance. The requests for a harmonious life or not to oppose the proposed division of property appearing in the mentioned wills prove that their consent or objection was of great or even crucial importance. This was due to the fact that increasing the inheritance mass for one of the heirs completely deprived or reduced the share provided for the others. In addition to requests and forewarnings about respecting their last will, the testators tried to influence and settle matters with relatives by leaving them smaller sums of money. This practice again resembles the solutions known from the Justinianic constitution, according to which the testator could disinherit the descendant without giving any reason, provided that they were given something, be it in the form of a legitim or a donation in precisely defined circumstances.[46] Since the testators argued their decision based, among others, on emotions and feelings, it can be assumed that these were justifications intended to influence the attitude of the other heirs. The city authorities focused most of all on preventing family conflicts. Hence, if the consent of the aggrieved relatives supported the testator's controversial will, the representatives of the authorities did not oppose it, and the files of last will, with records deviating from the customary distribution of property, could be created and executed.

In opposition to last wills which extend the spouse's inheritance, there are documents of last wills of women who do not include their spouses as heirs. The argument for recognizing their decision is the blatant 'ingratitude' of the partners stated in the document. In the case of the testaments cited in the article, this 'ingratitude' meant various forms of violence, primarily physical. What other behaviors could be considered as such in the legislation of early modern Lviv is difficult to indicate. Importantly, none of the testators directly asks for her husband's disinheritance but they all omit him in the will. In the Council Books of sixteenth-century Lviv, there is no judgment confirming or invalidating a last will in which the wife omitted her husband. The acts of last will referred to in this article can only be compared with the one belonging to Barbara, the widow of Mateusz Czarny. The woman leaves out her daughter in it, testifying that the latter has verbally and physically assaulted her. Despite the objection of the daughter's husband, councilors confirmed its legality.

It is impossible to be sure whether the child's "ingratitude" was treated the same way as the spouse's 'ingratitude'. Since the testaments cited in this article were registered in the presence of representatives of the municipal authorities, it can be presumed that the omission of the spouse, the perpetrator of violence, was considered by the authorities to be lawful or at least in accordance with the local customs.

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46 S. Kursa, "Formy wydzidziczenia", p. 91-92.

In justified cases, the possibility of disinheriting a relative was certainly a disciplinary element, controlling and influencing mutual contacts in bourgeois families.

Entirely incomparable to any other known acts of last will is the testament of Zygmunt, Kulików's mayor. It seems to capture a bribe for drawing up a will which set provisions that went beyond the accepted model of inheritance. So, was every Lviv citizen able, for an appropriate sum, to buy from the councilors the recognition of all decisions regarding the division of property after death? The vast majority of the acts of last will of the Lviv townspeople contain the division of property following the law of intestate succession. In addition, it should not be forgotten that Zygmunt, through his office and his acquaintances with representatives of the Lviv city elite, occupied a high position in the city's social hierarchy. These factors certainly influenced the attitude of the councilors towards Zygmunt. A single case of perceived corruption does not allow us to conclude that the law was not respected or applied in terms of inheritance rules in Lviv. At the same time, assuming this was the only corruption case may be risky. The content of Zygmunt's will suggests that appropriate sums of money could have persuaded the city authorities to be more understanding and adapt the law to the individual needs of the testator.

The testaments cited in this article exemplify the divergence between Lviv's theory and the practice of inheritance law and are an introduction to research on the scope of testamentary freedom. However, it would not be justified to say that the city was lawless or that the authorities were not functioning correctly. To the contrary, the presented files of last will testify to the reflection and state of the legal culture of early modern Lviv residents. The solutions proposed in the discussed wills, which were approved by the council, should be considered as resulting from understanding what justice is. Therefore, it was deemed worthy that a faithful and obedient wife, who enriched the common property with her work, was somewhat rewarded or distinguished from her relatives. Similarly, husbands who neglected, stole from, and abused their wives should not receive any benefits from their victims. The law in Lviv was not a rigid and unmovable creation, but it had the flexibility to be applied in the context of history and individual experiences.

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PART II

IUS COMMUNE AND LOCAL LEGAL DISCOURSE AND PRACTICE

CONSILIA BY THE LEUVEN LAW PROFESSORS ROBERTUS DE LACU († 1483) AND NICOLAUS EVERARDI (c. 1462-1532) ON THE LAW OF LAST WILLS

Wouter DRUWÉ

Abstract – This contribution presents some learned legal opinions (*consilia*) on the law of last wills by Robertus de Lacu and Nicolaas Everaerts. As professors of law at the young university of Leuven, De Lacu and Everaerts were asked for their insights on specific legal questions which had surfaced in daily legal practice. Their *consilia* provide a valuable insight into the interaction between the learned law – as it was taught at the university – and particular law in the Low Countries. From the studied *consilia*, it appears that both De Lacu and Everaerts can be considered as champions of testamentary freedom. They tried to maximally respect the last will of the deceased, notwithstanding contrary contractual stipulations or (what they saw as) excessive validity requirements. There was one exception though: the competence of secular authorities to regulate and even limit the *libertas testandi* of their subjects was recognized, as long as the *libertas testandi* was not completely taken away.

1. Introduction

Testamentary law in the Low Countries is not an untrodden field. It has been studied from several perspectives. Thus, Godding has, for instance, attributed several pages in his monumental oeuvre on the legal history of the Low Countries to the Netherlandish customary laws with regard to the law of succession.[1] Recently, Kaat Cappelle has defended her Ph.D. dissertation on the role of women in sixteenth-century Antwerp customary law, thereby also focusing on joint last wills of spouses.[2] Earlier

[1] P. GODDING, *Le droit privé dans les Pays-Bas méridionaux du 12e au 18e siècle* [*Private Law in the Southern Low Countries from the 12th to the 18th Centuries*], Brussels, 1987, p. 377-402. Cf. also: IDEM, "Dans quelle mesure pouvait-on disposer de ses biens par testament dans les anciens Pays-Bas méridionaux?" ["To What Extent Could One Dispose of One's Goods by Last Will in the Ancient Southern Low Countries?"], *The Legal History Review* 50 (1982), p. 279-296.

[2] See especially: K. CAPPELLE, "Out of Extraordinary Love and Affection. Gender, Spousal Wills and the Conjugal Strategy of Commercial Households in Sixteenth-century Antwerp", *Rechtskul-*

already, in the impressive comparative volume on the legal history of 'acts of last will' by the *Société Jean Bodin*, overview articles on the Low Countries have been published.[3] A type of source, however, that has not yet received a lot of attention in this debate, is the so-called *consilia* literature.[4]

Consilia or *responsa* have their origins in the twelfth-century Italian city states. By the fourteenth century, and more structurally since the foundation of the Leuven university in 1425, the *consilia* practice had also reached the Low Countries.[5] *Consilia* contain legal advice by academically trained jurists, who most often had obtained a degree of *doctor iuris* and were usually active either as law professors or as *advocati* or counsellors at the emerging sovereign courts, and gradually also in the magistracies of larger towns. *Consilia* – which are usually written in the framework of specific cases – are an excellent type of source in order to study the role and authority of the learned law, *ius commune*, for legal practice. Admittedly, as most *consilia* have been written at the request of one of the parties to a running or ensuing legal dispute, any argumentation based on those sources requires a certain degree of caution; often, it is difficult to find out to what extent the reasoning developed in the *consilium* has actually determined the final judicial decision. Nonetheless, the mere fact that parties were willing to pay law professors for their learned advice, as well as the constatation that these law professors did not merely restrict themselves to a brief explanation of local law, but also invoked a lot of arguments based on Roman and canon law, is already an indication of the *ius commune*'s concrete impact and relevance for legal practice. In an earlier study on *consilia* with regard to loans and credit, it has been shown that most authors tried to remain as consistent as possible in their legal argumentation, also across different

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tur. Zeitschrift für europäische Rechtsgeschichte [*Legal Culture. Journal for European Legal History*] 10 (2022), p. 1-28. See also: EADEM, *De strijd om de broek. Getrouwde vrouwen en recht in het zestiende-eeuwse Antwerpen* [*The Battle for the Trousers. Married Women and Law in Sixteenth-Century Antwerp*], unpublished doctoral dissertation, Vrije Universiteit Brussel, 2020.

3 P. GODDING, "L'acte à cause de mort dans les Pays-Bas méridionaux (XI^{e}-XVIII^{e} s.)" ["The Act of Last Will in the Southern Low Countries (11th-18th Centuries)"], in: L. WAELKENS (*ed.*), *Actes à cause de mort – Acts of Last Will*, II. *Europe médiévale et moderne – Medieval and Modern Europe* [Recueils de la Société Jean Bodin pour l'histoire comparative des institutions = Collections of the Jean Bodin Society for the Comparative History of Institutions, 60], Brussels, 1993, p. 161-176; P. L. NÈVE, "L'acte à cause de mort dans les Pays-Bas septentrionaux à l'époque moderne" ["The Act of Last Will in the Northern Low Countries in the Modern Period"], in: *Ibidem*, p. 177-184.

4 For a recent overview of the existing literature on *consilia*, with many further references, see: W. DRUWÉ, *Loans and Credit in Consilia and Decisiones in the Low Countries (c. 1500-1680)* [Legal History Library, 33], Leiden, 2020, p. 24-30 and 33-52.

5 See already, for a very early *consilium* (late thirteenth century) by learned scholars from Orléans in favour of the abbey of Ter Duinen in the county of Flanders: C. H. BEZEMER, "Une consultation orléanaise pour l'ordre cistercien" ["A Consultation from Orléans for the Cistercian Order"], in: R. FEENSTRA and C. M. RIDDERIKHOFF (*eds.*), *Études néerlandaises de droit et d'histoire présentées à l'Université d'Orléans pour le 750^{e} anniversaire des enseignements juridiques* [*Dutch Studies on Law and History presented to the University of Orléans for the 750th Anniversary of Legal Education*] [Bulletin de la Société archéologique et historique de l'Orléanais = Bulletin of the Archaeological and Historical Society of the Orléans Region, 68], Orléans, 1985, p. 97-106.

cases, which indicates that they did not necessarily bend the law dramatically in order to serve their clients' needs.[6]

The importance of some *consilia* surpasses that of the individual case for which they have been written. That is especially true for those *consilia* that have been collected, and even more so for those that have eventually been printed. The practice of collecting *consilia* already existed, albeit probably only to a rather limited extent, in the fifteenth-century Low Countries. At least three volumes of *consilia* from the late-fifteenth and early-sixteenth-century Netherlands have been preserved. These manuscript volumes are respectively kept in the *FelixArchief* Antwerp, the Royal Library of Belgium (KBR) in Brussels, and the *Collectie Overijssel* in Zwolle.[7] Whereas the two latter have been drafted in the religious context of the Congregation of Windesheim, the former one is a private collection by the Antwerp notary Adriaen van der Blict.[8] All three manuscript volumes contain *consilia* by several *doctores iuris*, many of them with links to either the Cologne university, the Liège officiality, or the young university of Leuven. One of the authors who appears in each of those three volumes and who, in the field of testamentary law, has written several relevant *consilia*, was Robertus de Lacu. A professor of canon law at the Leuven university from 1463 until his death in 1483, he has thrice been rector of the university.[9]

Apart from those manuscript collections from the late-fifteenth and early-sixteenth centuries, there is also the printed collection of 247 *consilia* by Nicolaas Everaerts (Nicolaus Everardi, 1461/2-1532), published posthumously in 1554.[10] This is even the very first printed collection of *consilia* by an author active in the Low Countries. Between 1493 and 1505, Everaerts was a professor of civil and canon law at the Leuven university, that is before he was appointed councillor at the Great Council of Mechelen (1505), president of the Court of Holland (1510)

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6 Cf. W. Druwé, *Loans and Credit*, especially p. 756-758.

7 For a presentation of those three sources, see: D. van den Auweele and M. Oosterbosch, "Consilia juridica lovaniensia. À propos de trois recueils d'avis juridiques du XV^{e} siècle" ["On Three Volumes of Juridical Consultations from the 15th Century"], in: F. Stevens and D. van den Auweele (*eds.*), *Houd voet bij stuk. Xenia iuris historiae G. van Dievoet oblata*, Leuven, 1990, p. 105-148. For a prosopographical analysis, see: H. De Ridder-Symoens, "Conseils juridiques et monde universitaire au XV^{e} siècle. Une étude prosopographique" ["Juridical Consultations and the University Context in the 15th Century. A Prospographical Study"], *The Legal History Review* 60 (1992), p. 393-424.

8 For a discussion of the content of the two volumes which had been written in the framework of the Congregation of Windesheim, see: W. Druwé, "Learned Law in Late Medieval Netherlandish Practice: *Consilia* for the Congregation of Windesheim (ca. 1415-1500)", *The Legal History Review* 89 (2021), p. 125-157.

9 On Robertus de Lacu and his *consilia*, see: W. Druwé, "De adviespraktijk van Robertus de Lacu, een Gentenaar in Leuven (1463-1483)" ["The Consultation Practice of Robertus de Lacu, a Ghent Citizen in Leuven (1463-1483)"], in: F. Judo and J. Pauwels (*eds.*), *Juventitutis Dux, Juris Doctor. Liber amicorum amicarumque Jozef Dauwe*, Dendermonde, 2021, p. 69-79.

10 Nicolaus Everardi, *Responsa siue Consilia*, Leuven, Servatius Sassenus and the heirs of Arnoldus Birckmann, 1554 (henceforth: Everardi). For this contribution, we used the 1577 Frankfurt edition.

and, finally, president of the Great Council of Mechelen (1528).[11] This printed collection of *consilia* has become quite popular, as the volume was reprinted several times over almost a century, namely in Leuven (1577), Frankfurt (1577, 1594 and 1619), Arnhem (1642) and Antwerp (1643). To give an illustration of the importance of this collection: the famous jurist Hugo de Groot counselled his brother Willem, in a letter from 31 May 1620 (88 years after Everaerts' death), to read this volume of *consilia*, in order to get acquainted with the ways to apply the Roman law to concrete legal practice.[12] Some of those *consilia* have already been studied in earlier scholarship, but the *consilia* on the law of last wills have not yet received attention.[13]

For the current contribution, a selection is made of *consilia* by respectively Robertus de Lacu and Nicolaas Everaerts on the law of last wills. Both have written on very diverse aspects of testamentary succession. Some of their *consilia* on the theme are especially interesting because of the involvement of some major historical figures. Robertus de Lacu, for instance, had to deal with the testamentary succession of the famous Renaissance artist Rogier van der Weyden (Roger de la Pasture), notably in the framework of a discussion between his sons Jan and Pieter.[14] Nicolaas Everaerts, in turn, was a counsellor in a case that involved the succession of Henry of Bergues, bishop of Cambrai, who died in 1502. In the latter case, the counsellor for the opposing party seems to have been Adrian of Utrecht, then an influential professor of theology at the university of Leuven. Interestingly, Everaerts, whereas acknowledging Adrian's expertise in theology ('*cuius authoritas licet sit magna in sacra pagina*'), disqualified the latter in the domain of law, adding the proverb that 'one should not put one's sickle in another's harvest' ('*mittere falcem in messem alienam*'). Adrian of Utrecht would later, in 1522, be elected Pope Adrian VI.[15]

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[11] L. WAELKENS, "Nicolaas Everaerts, un célèbre méconnu du droit commun (1463/4-1516)" ["Nicolaas Everaerts, a Misunderstood Celebrity of the *Ius Commune* (1463/4-1516)"], *Rivista internazionale di diritto comune* [*International Journal of Ius Commune*] 2004, p. 173-183; O. M. D. F. VERVAART, *Studies over Nicolaas Everaerts (1462-1532) en zijn Topica* [*Studies on Nicolaas Everaerts (1462-1532) and His Topica*], Rotterdam, 1994; L. J. VAN APELDOORN, "Nicolaas Everaerts (1462-1532) en het recht van zijn tijd" ["Nicolaas Everaerts (1462-1532) and the Law of His Time"], *Mededeelingen der Koninklijke Academie van Wetenschappen. Afdeling Letterkunde* [*Announcements of the Royal Academy of Sciences. Department of Arts*] 1935, p. 291-348.

[12] '*Interea commendo tibi Merulae librum (…). Praeterea Paponem, Gallium et Marantam, et Everhardi tum locos communes tum consilia, neque praeterea quicquam, ne multis te libris oneres.*' This letter was quoted by: L. J. VAN APELDOORN, "Nicolaas Everaerts", p. 307 and 343.

[13] See, for a study of *consilia* 2, 3, 31, 39, 60, 91, 105, 133, 151 and 195: O. M. D. F. VERVAART, *Studies over Nicolaas Everaerts*, Rotterdam, 1994, p. 178-215. See also: C. M. G. TEN RAA, *Consilium nr. 105 van Nicolaas Everaerts* [*Consilium no. 105 of Nicolaas Everaerts*] [Mededelingen van het Juridische Instituut van de Erasmus Universiteit Rotterdam = Announcements of the Juridical Institute of the Erasmus University Rotterdam, 10], Rotterdam, 1978. For a study of *consilia* 16, 72, 74, 78, 99, 103, 105, 150, 168, 187, 219 and 240, see: W. DRUWÉ, *Loans and Credit*.

[14] Antwerp, FelixArchief, Fonds Notariaat, nr. 3692, fol. 51v. This *consilium* was preceded by another advice in the same case, signed by Joannes de Gronselt and Joannes de Coudenberge.

[15] N. EVERARDI, *cons.* 115, p. 286-289, especially nr. 18: '*Et ita meo exiguo iudicio debet iudicari, non obstante opinione venerandi magistri nostri, cuius authoritas licet sit magna in sacra pagina, tamen in materia legali quae non est de foro suo, et in qua, cum consulit, dicitur temere contra*

An exhaustive overview and analysis of all *consilia* by De Lacu and Everaerts on all aspects of testamentary succession would by far exceed the limits of the present contribution. The aim of this contribution is to focus on two major sub-themes, namely the issue of testamentary freedom and that of validity requirements for a last will.

2. Testamentary freedom

a. The value of testamentary freedom

Testamentary freedom includes the freedom to decide what happens with one's goods after one's death, as well as the freedom to unilaterally alter that last will until one loses one's mental capacity and free volition. This testamentary freedom was received from Roman law, also incorporated in canon law, and, thus, highly valued in the late-medieval learned legal tradition.[16] The high respect for the last will of the deceased permeated *ius commune* literature. Thus, the learned law, for instance, provided – with Justinian's Digest 2,15,6 as its foundation (the so-called *lex* '*Ex his*') – that the value of last wills was so important that one could never renounce one's claims on the basis of such a last will before having actually seen and read the words of the last will. This point was essential in the aforementioned dispute on the last will of the artist Rogier van der Weyden. Apparently, his son Jan had agreed to his brother Pieter's and his mother's proposal that he would receive a life annuity instead of his share in the inheritance under his father's last will. However, the life annuity turned out to be much lower than the actual share. Jan had agreed to the transaction without having been duly informed about the exact contents of that last will. The rule of the *lex* '*Ex his*' concerned public utility and had been drafted in order to avoid that people would hide testaments in disrespect of the testator's last will. The *lex* '*Ex his*' did not allow for any prior renunciation. Consequently, the *in solutum datio* of a life annuity and the *pactum de non petendo* which Jan had signed up to, were both invalid.[17] According to De Lacu, Jan could still claim his full share under his father's inheritance.[18]

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professionem suam mittere falcem in messem alienam, potius standum erit scriptis Bartoli et aliorum, tam illustrium virorum in scientia legali expertorum (…).'

16 See, recently: S. RIGAUDEAU, *Le testament en droit canonique du XII^e au XV^e siècle* [*The Last Will in Canon Law from the 12^th to the 15^th Centuries*] [Thèses, 208], Paris, 2021.

17 An *in solutum datio*, in Roman law, is the act of discharging an obligation by giving something else than what was actually due. A *pactum de non petendo* is an agreement not to start any dispute or to file any claim in court.

18 Antwerp, FelixArchief, Fonds Notariaat, nr. 3692, fol. 51v.: '*(…) illa transactio que allegatur hic per reum contra actorem cum non valuit tamquam per errorem inita, non prestat aliquem titulum ipso iure reo qui putatur fuisse in dolo presumpto, ut deductum fuit per actorem in suis scripturis*.' Hereby, Robertus de Lacu gave his approval to the advice by Stephanus de Lignana and Joannes de Coudenberghe in the same case.

Despite its high value in *ius commune*, this testamentary freedom was regularly limited or even endangered, sometimes by contractual stipulations made during one's lifetime, sometimes by a legislator. The validity of those limitations was regularly called into question in judicial proceedings, and therefore also debated by the Leuven law professors in their *consilia*. In what follows, some examples of both categories of attempts to limit the *libertas testandi* will be discussed.

b. Contractual limitations to the testamentary freedom

A first quite frequent limitation to the testamentary freedom was a promise made during one's lifetime but *ex causa mortis* to donate a substantial part of one's property to a beneficiary. This was especially problematic if it was framed as a contractual stipulation, and thus strictly speaking binding from the time of the promise already. In some circumstances, such promises were interpreted as *pacta futurae successionis*, pacts with regard to a future inheritance. Such pacts were forbidden in Roman law. Apart from some moral arguments against these *pacta*, as they might induce the beneficiary to hope for the death of the promisor, their limitation of the promisor's testamentary freedom formed the major argument for their invalidity according to *ius commune*.[19] These (invalid) *pacta futurae successionis*, however, had to be distinguished from (valid) *donationes mortis causa*, donations which became binding only after one's death.

Making such distinctions was not always self-evident. In *consilium* 28, Everaerts, thus, had to deal with a promise made by a wife ('Sempronia'), with the consent of her husband ('Titius') and through a solemn stipulation, that half of her patrimony after her death would go to a cognate ('Maevia') in view of the latter's marriage ('*in subsidium matrimonii*'). In that same deed, however, Sempronia explicitly reserved for herself and for herself jointly with Titius the faculty to make a last will. After Sempronia's death, Titius argued that the contractual promise in favour of Maevia had to be interpreted as an invalid *pactum futurae successionis*, and that it would consequently be of no effect. Everaerts, however, who defended Maevia's position, argued that it should be interpreted rather as a donation which took effect after Sempronia's death (*donatio post mortem* or *donatio mortis causa*).[20] Sempronia's promise, both by reason of its express reservation and by reason of its

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19 Cf.: N. Everardi, *cons*. 28, p. 97, nr. 4: '*Aliud enim est dicere 'promitto tibi, quod tu eris haeres meus', vel 'quod tu mihi succedes', aut 'quod faciam te haeredem', vel 'quod succedes aequaliter cum fratre suo', vel pacisci de successione tertii: quae promissiones tanquam contra bonos mores et impedientes liberam testamenti factionem, nihil penitus valent, neque aliquam obligationem inducunt, etiam naturalem, etiam si essent iuratae, et etiam interveniente solenni stipulatione; et ita loquuntur [C. 2,3,15, Pactum quod dotali] [C. 2,3,19, Licet] [C. 2,3,30, De quaestione] et [D. 45,1,61, Stipulatio hoc modo concepta] et ibi Doctores*.'

20 N. Everardi, *cons*. 28, p. 97, nr. 4: '*Et aliud est dicere, 'promitto vel dono tibi medietatem omnium bonorum meorum, vel omnia bona mea post mortem meam', ut in casu praesenti; quia tunc valet, ut dicit glossa in [C. 2,3,30,3, § Secundum veteres] in verbo 'accommodaverit', (…) quam sic communiter (…) omnes Doctores declarant, intelligunt, et sequuntur*.'

nature as a *donatio mortis causa*, had not taken away her freedom to draw up a last will. Until her death, she had retained the liberty to institute any person whomsoever as her testamentary heir. The mere fact that this heir would then be obliged to pay Maevia half of the inheritance, did not alter its qualification as a *donatio mortis causa*.[21] This also implied that, had Sempronia wished so, she could have altered her promise.[22] Once Sempronia had died, the *donatio mortis causa* became irrevocable, also by the husband who had once consented to the said clause. Thus, Everaerts upheld the criticism against (in principle invalid) binding promises, but did allow for interpretations of some dubious promises as valid *donationes mortis causa*.

A correct interpretation of contractual stipulations sometimes required that particular provisions had to be severed from the other ones. Thus, Everaerts discusses in his *consilium* 128 how in a prenuptial contract of 1484, one of the stipulations would only take effect after the death of the promisor. This very fact made this stipulation a so-called 'last will' (*ultima voluntas*), which – during his lifetime – could be altered by the promisor at will, even without the consent of the other contracting party.[23] In *consilium* 171, the same Everaerts confirmed that if a donation mentioned that the goods would only be transfered after the death of the donator, it had to be considered – definitely in the absence of a reservation of usufruct – as a *donatio mortis causa*, even if that exact terminology had not been used.[24]

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[21] N. Everardi, *cons*. 28, p. 97, nr. 4: '*Huiusmodi enim promissio non aufert liberam testandi facultatem; potest enim sic promittens quemcunque voluerit instituere haeredem, sed ille institutus tenebitur stipulanti dare id quod ei promissum est per defunctum*.'

[22] N. Everardi, *cons*. 28, p. 97, nr. 5: '*Ad secundam autem quaestionem dico, quod huiusmodi conventio, promissio, vel addictio est et censeri debet donatio causa mortis (…) et sic revocabilis fuit quo ad ipsam Semproniam, tam ex reservatione de qua in themate, quam ex natura sui, iuribus vulgaribus et ipsa plenum effectum sortita fuit statim post mortem dictae Semproniae; quia hoc est de natura donationis causa mortis, quod confirmatur morte donantis iuribus vulgaribus, nec ad confirmationem eius requirebatur aditio hereditatis dictae Semproniae*.'

[23] N. Everardi, *cons*. 128, p. 311, nr. 1: '*Et ratio quae me movet est, quia dispositio seu divisio bonorum facta per dictos A et B in dicto contractu antenuptiali anno 84. et in dicta alteratione anno 87. non potest dici dispositio inter vivos, sed ultima voluntas, quia in ea disponitur de eo, cuius effectus confertur post mortem, ergo habet naturam ultimae voluntatis [D. 39,6,42, Seia] et [D. 33,4,11, Seia] et [D. 31,80, Legatum], et volunt expresse Jacobus de Arena, Cynus, Bartolus, Baldus et al. in auctentica Si qua mulier [C. 1,2] et est de mente glossae in [C. 3,36,10, Quotiens], et ibi Paulus de Castro et Doctores. Sequitur ergo, quod potuit mutari, alterari, et revocari, [D. 32,22, Si quis in principio testamenti] cum ibi notatis per Doctores, iunctis [D. 34,4,3, Si quis] [D. 34,4,4, Quod si iterum] et [X. 3,41,6, Cum Marthae] [C. 1,2,1, Habeat]*.'

[24] N. Everardi, *cons*. 171, p. 395, nr. 2: '*Nec videtur obstare si dicatur, quod in dicta donatione tempus mortis non sit adiectum verbis dispositivis, sed solum verbis executivis, quare censeri deberet donatio inter vivos et non causa mortis, per Baldum in additionibus ad Speculum sub titulo de 'instrumentis editionis' (…). Quia illud dictum Baldi loquitur in casu, quando donator in ipsa donatione expresse reservavit sibi usumfructum, quod non est in casu nostro: quia in literis donationis nulla sit mentio de expressa reservatione ususfructus.'* Thus, Everaerts explains that an explicit reservation of usufruct would be an indication to interpret the clause as a *donatio inter vivos* of the bare property of certain goods (with the full property being acquired after the donator's death). In principle, however, the reference that full property would be acquired after the donator's death would indicate that it was a *donatio mortis causa*. Cf. *Ibidem*, p. 396, nr. 6: '*(…) in quibus locis praefati Doctores in effectu volunt, quod quando potest apparere, quod donator voluit facere donationem inter vivos, ut quia hoc*

Another example of a contractual stipulation that seemed to limit the promisor's own *libertas testandi*, can be found in a case discussed in a manuscript *consilium* by Robertus de Lacu.[25] De Lacu discusses a pre-marital agreement in which the father of a bride promised his son-in-law a 'child's portion' of the inheritance. Some years later, however, this bride's father drafted a last will in which he included bequests to his proper children (thus favouring them over the son-in-law). The son-in-law disputed the validity of that last will, as it would infringe the father-in-law's binding promise to attribute to the son-in-law a 'child's portion'. Robertus de Lacu accepted the validity of the pre-marital agreement *in se*, but stressed that this had to be interpreted necessarily in a way that was compatible with testamentary freedom. Therefore, the promise of 'a child's portion' should not impede the promisor to draft a last will. It merely meant that at least a 'legitimate portion' had to be granted to the son-in-law, *i.e.* the portion a testator could never refuse his own children.[26]

The same concern to uphold testamentary freedom can also be found in Nicolaas Everaerts' *consilium* 6. That *consilium* deals with a situation where children had renounced their mother's inheritance in favour of their father, and where the father had solemnly promised in a notarial deed not to donate, sell, or transfer his present and future goods to anyone else; the father's promise had even been secured by a general hypothec on all his goods, both present and future. Nonetheless, despite this promise, the father had donated and bequeathed several goods to a certain 'G'. Everaerts, who seems to have written his *consilium* at the request of G., could easily have argued that the father's promise was invalid anyway as contrary to testamentary freedom.[27] However, that is not what Everaerts did. Instead, he stated that this promise *in se* was valid, as it only concerned specific bequests and therefore did not restrict the father's freedom to institute someone as a (universal) heir, thus ensuring a sufficient degree of testamentary freedom. Notwithstanding this promise, specific bequests and the ensuing transfer of property remained valid,

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expressit, vel quia dixit, quod esset irrevocabilis, vel quia retinuit sibi expresse usumfructum, vel quia fecit mentionem de haeredibus donatarii: tunc censenda est donatio inter vivos, licet etiam fiat mentio mortis. Sed quando nullum horum intervenit, sed potius concurrunt plures verisimiles et vehementes coniecturae in contrarium, ut in casu praesenti, tunc in dubio, ex quo in ea est facta mentio mortis, censeri debet donatio causa mortis, et non inter vivos, per [D. 33,4,11, Seia] (…).'

25 Brussels, Royal Library of Belgium (KBR), ms. 1382-91, fol. 301v-303r.

26 Brussels, Royal Library of Belgium (KBR), ms. 1382-91, fol. 303r: '*Respondetur quod mater potest donare et liberalitatem suam habundancius exercere in suas filias vel filios seu donacione inter vivos seu in testamento suo et illud eciam non veniet importandum vel conferendum (…) Ymmo quicquid sic per matrem suis filiabus fuerit donatum inter vivos morte matris confirmabitur irrevocabiliter nec hanc donacionem poterit impedire J. gener vel proles sue dummodo in donacione premissa ipsa mater non fraudaverat alios suos heredes de legittimis eorum porcionibus (…).*'

27 He was aware that some learned authors would even have supported this opinion. See: N. Everardi, *cons.* 6, p. 25, nr. 5: '*Quia si ipsa pactio intelligatur universaliter, ut sonare videtur, et ut comprehendat omnem speciem alienationis tam inter vivos, quam in ultima voluntate: tunc redderetur inutilis et nulla, et hoc ex duplici capite. Primo, quia impediret liberam testamenti factionem contra [C. 2,3,15, Pactum quod dotali] et [C. 2,3,30, De quaestione] cum ibi notatis per Doctores et videtur casus in [D. 45,1,61, Stipulatio hoc modo concepta].*'

as the promise had no invalidating effect; if the promise was not respected, the father merely owed his children a due compensation. *De facto*, however, this claim was of little avail. After the father's death, once the children as his heirs took over the possession of the inheritance, their claim *ad interesse* against their father's inheritance had namely automatically been discharged through the Roman legal technique of *confusio*.[28]

Linked to these contractual stipulations limiting testamentary freedom is also the rather frequent case of a joint last will of spouses in which the spouses included that a change of this last will would require the consent of the other spouse too. In line with the *communis opinio* among the late-medieval learned jurists, Nicolaas Everaerts stressed in his *consilium* 79 that a joint last will of spouses was actually to be interpreted as two separate last wills ('*testamenta tot sunt, quot personae testamentum facientes*').[29] If such a joint last will concerned the communal marital goods, every spouse was presumed to dispose only of his own part.[30] This implied also that, notwithstanding any contrary stipulation in the last will, the freedom to dispose of one's own goods remained intact, although – as Everaerts argued in another *consilium* – it should be mentioned that, if the first last will contained a so-called 'derogatory clause' *ne revocetur*, in the new last will the prior one had to be revoked in very clear and explicit terms.[31] Therefore, even after the death of the other spouse, the surviving one would still be able to retract his or her old last will and to draw up a new one.[32] Only with regard to the goods that belonged to the

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28 N. Everardi, *cons.* 6, p. 28, nr. 26: '*Ex quibus omnibus infertur, quod non obstante promissione per patrem facta, ipse pater valide potuisset, si voluisset, testamentum condere, et haeredem legitimum vel extraneum instituere, absque eo quod de contraventione huiusmodi promissionis in aliquo notari potuisset: donare vero vel legare absque contraventione non potuit, sed non ideo minus donatio et legatum valent sortirique debent effectum, per supra allegata: licet pater donando vel legando obligetur prolibus suis ad interesse, quae tamen obligatio per successionem et apprehensionem haereditatis paternae fuit et est confusa, et sic stat conclusio supradicta, quod tam donatio, quam legatum, non obstantibus praemissis, mero iure valet.*'

29 N. Everardi, *cons.* 79, p. 221, nr. 1: '*Primo, quia de iure duo censentur esse testamenta, ex quo vir et uxor simul testati sunt, quia tot sunt testamenta, quot sunt personae testamentum facientes, ut vult Oldra[dus de Ponte] in consilio suo 174 et Ioan[nes] And[reae] in add[itionibus] Spec[uli] titulo 'de testamentis' § 1 per iura ibidem per eos allegata, quae ad hoc bene faciunt.*'

30 N. Everardi, *cons.* 79, p. 221, nr. 2: '*Praeterea ex quo duo sunt testamenta, et testati sunt dicti coniuges de communibus bonis per eos acquisitis, censetur unusquisque in dubio disposuisse de parte sua, et minime de parte alterius, ut est textus in [D. 30,5,2, § Cum fundus] et vult Bald[us] in [C. 6,26,11, Si quis] et faciunt notata per Ioannem de Imola in [D. 31,89,6, § Filium] quod enim commune est, meum est, quo ad dispositionem partis meae.*'

31 N. Everardi, *cons.* 167, p. 385, nr. 15-16: '*Quia respondeo et dico, quod quando in primo testamento seu ultima voluntate est clausula derogatoria, tunc non statur secundo, nisi testator expresse et specialiter poeniteat primae voluntatis, ut dixi supra. Et dicitur specialiter poenitere, quando facit mentionem de qualitate primae voluntatis, ut si dicat, non obstante quocunque alio testamento in contrarium facto, in quo continentur verba derogatoria huius testamenti: ita dicit glossa ordinaria singularis in [D. 30,12,3, § In legatis], et ibi Paulus de Castro, qui singulariter dicit, quod hoc casu generalis mentio non sufficit (…) sed specialis est necessaria (…).*'

32 Cf. also: N. Everardi, *cons.* 167, p. 384, nr. 1: '*(…) licet ambo in una charta suam ordinaverint ultimam et extremam voluntatem, ita quod videatur prima facie unus codicillus et non duo,*

deceased spouse, had the 'joint last will' become definitive. A clause in the joint last will which made the retraction or adaptation of those testamentary provisions subject to the consent of the other spouse, was not effective, even if it had been accompanied by an oath.[33] Everaerts again stressed the testamentary freedom: *quia testamenti factio non potest dependere ex alieno arbitrio*!

c. Statutory limitations to testamentary freedom

A second category of limitations to the testamentary freedom included those set by the prince or by other secular authorities. Also on this point, the *consilia* include a few telling examples. Thus, under the reign of Philip the Handsome (r. 1482-1506), natural children could only draft a valid (and effective) last will if they had previously been granted a *licentia testandi* by the prince himself, a licence for which they (obviously) had to pay.[34] In the absence of such a *licentia*, and in the absence of (legitimate) offspring, customary law in the Low Countries (*consuetudo patriae*) implied that the fisc inherited all goods, or at least all immovable goods.[35] This system had existed earlier in the Burgundian Low Countries too, but had been

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tamen in veritate sunt duo codicilli, unus dicti Theobaldi, et alter antetactae domicellae Mariae, ita quod post mortem primo decedentis superstes potuit huiusmodi testamentum vel codicillum pro parte sua revocare, et aliter disponere, ut eleganter vult Oldradus in consilio suo 174 et sequitur Ioannes Andreae in additionibus ad Speculum (…).'

33 N. Everardi, *cons.* 79, p. 222, nr. 7: '*Sed in casu nostro est iure cautum, quod quamvis aliquis promisisset non revocare testamentum sine consensu alterius, imo etsi iurasset, tamen posset revocare, iuxta notata per Bartolum et Doctores in [D. 32,22, Si quis in principio testamenti] et est ratio, quia testamenti factio non potest dependere ex alieno arbitrio [D. 28,5,32pr., Illa institutio] [C. 6,21,11, Captatorias] et [D. 30,64, Captatoriae] pro quo etiam bene facit textus in [D. 35,1,72,4, § Si arbitratu] et notata per Paulum de Castro et Doctores in [D. 30,54,1, § Si Titiae] in quibus locis habetur, quod conditio apposita legato contra libertatem matrimonii, quod debet esse liberum, reiicitur. Sic etiam pactum appositum contra libertatem revocandi testamentum debet reiici, cum testamenti factio et eiusdem revocatio debet esse libera [C. 1,2,1, Habeat] et non debet dependere ex alieno arbitrio, iuribus supra allegatis.*'

34 Interestingly, a study of ducal accounts for the Brabantine Bailiwick of 's-Hertogenbosch (Bois-le-Duc) shows that, if Philip the Handsome – as suggested by Everaerts – had already re-introduced the *licentia testandi* in his *intronisatio* of 1482, it only seems to have had effect from 1487 onwards, as the receiver recorded no income from *licentiae testandi* for the period 1478-1487. See: T. de Hingh, *Studie van de domeinrekeningen van 's-Hertogenbosch 1460-1519* [*Study of the Manorial Accounts of Bois-le-Duc 1460-1519*], unpublished licentiate thesis Vrije Universiteit Brussel, 1990, p. 53-55. In the 1494 Joyous Entry, Philip had indeed silently abrogated Mary of Burgundy's rule on illegitimate children's testamentary freedom, cf.: V. Vrancken, *De Blijde Inkomsten van de Brabantse hertogen. Macht, opstand en privileges in de vijftiende eeuw* [*The Joyous Entries of the Brabantine Dukes. Power, Revolt and Privileges in the Fifteenth Century*], [Standen en Landen, 112], Brussels, 2018, appendix 2. I would like to thank dr. Mark Vermeer for drawing my attention to these references.

35 Cf. N. Everardi, *cons.* 220, p. 495, *pr.*; Idem, *cons.* 222, p. 500, nr. 1. In *consilium* 222 (p. 500, nr. 3-4), Everaerts argues that this custom – which was contrary to the *ius commune* – should be interpreted restrictively. In principle, other family members, even if only collaterally related, would be preferred over the fisc, certainly if the *decujus* was a merely natural child (*bastardus, vel naturalis tantum*), *i.e.* not born out of adultery or incest.

abolished during the reign of Mary of Burgundy (r. 1477-1482).[36] In *consilium* 70, Everaerts discussed the validity of a last will which a certain Elizabeth Coninx had drafted during Mary's reign, whereas she only died during Philip's reign. Coninx was a natural child and had not acquired any *licentia testandi*. Duke Philip's representatives argued that the last will was null and void and claimed the full inheritance. Everaerts maintained the validity of the last will, but founded this argument solely on a reasoning with regard to the temporal application of the law: the introduction in Philip's *intronisatio* of the requirement of a *licentia testandi* did not invalidate wills which had been drafted previously.[37] Interestingly, Everaerts did not fundamentally question the right of the sovereign to make one's freedom to draft a testament subject to such a *licentia testandi*. The few disputes that can be found in Everaerts' *consilia* on this issue, only concerned the concrete modalities of this procedure for obtaining a *licentia*. Thus, in *consilium* 220, for instance, Everaerts brought foward that a *licentia testandi* obtained by a priest who was born out of wedlock, was valid, even if that priest had not specified the exact value of all his goods, whereas the counterparty had argued that this value should have been mentioned on pain of nullity. According to Everaerts, the intervention of and verification by the Chamber of Auditors (*Rekenkamer*, *Chambre des comptes*) sufficed.[38] If the Chamber of Auditors did not take sufficient care, it was the duke's fault, as he should have appointed better functionaries, as Everaerts added in *consilium* 222 on the last will of another 'bastard' priest.[39]

In *consilium* 71, Everaerts – who was sometimes also asked for his advice on cases which had to be treated outside of the Low Countries – considered

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[36] R. VAN UYTVEN (with P. DE RIDDER), "De Blijde Inkomst van Maria van Bourgondië (29 mei 1477): Uitgave van de tekst en van een eigentijdse commentaar" ["The Joyous Entry of Mary of Burgundy (29 May 1477): Edition of the Text and of a Contemporary Commentary"], in: M.-A. ARNOULD and W. P. BLOCKMANS (*eds.*), *Le privilège général et les privilèges régionaux de Marie de Bourgogne pour les Pays-Bas, 1477 = Het algemene en de gewestelijke privilegiën van Maria van Bourgondië voor de Nederlanden, 1477* [*The General Privilege and Regional Privileges of Mary of Burgundy for the Low Countries, 1477*], Kortrijk-Heule, 1985, p. 315, c. 43.

[37] N. EVERARDI, *cons.* 70, p. 198, nr. 1: '*Ad hoc quod testamentum per aliquem conditum de iure debet censeri validum, sufficit quod condens testamentum sit tempore quo condidit testamentum ad testandum habilis et idoneus: et non requiritur, quod apud eum sit tempore decessus eiusdem testamenti factio, (…) et est textus de hoc ad literam clarus in [D. 37,11,1,9, § Si quis autem testamentum fecerit], ubi textus sic inquit: 'Si quis autem testamentum fecerit, deinde amiserit testamenti factionem vel furore, vel quod ei bonis interdictum est, potest eius peti bonorum possessio, quia iure eius testamentum valet'. Et hoc generaliter de omnibus huiusmodi dicitur, qui amittunt mortis tempore testamenti factionem, sed ante factum eorum testamentum valet*.'

[38] N. EVERARDI, *cons.* 220, p. 496, nr. 3: '*Nec obstat quod obiicitur de surreptione licentiae testandi propter non expressionem valoris bonorum, quia dicta licentia testandi est per cameram computorum, mediante certa compositione, interinata nec etiam aliquo iure vel constitutione cautum reperitur, quod valor bonorum in impetratione talismodi licentiae debeat exprimi, imo decisio doctorum est in contrarium, in [X. 1,3,8, Ad aures]*.'

[39] N. EVERARDI, *cons.* 222, p. 501, nr. 8: '*Nec obstat, quod in licentia testandi non est expressus valor bonorum, quia hoc nullo iure cavetur, imo decisio Doctorum est in contrarium, ut patet ex notatis per Doctores in [X. 1,3,8, Ad aures], et imputet sibi princeps quod non elegit diligentiores officiarios quibus interinementum huiusmodi literarum commisit*.'

restrictions to testamentary freedom imposed by the statutory law of the town of Hamburg. The Hamburg town statutes especially included a prohibition of donations or last wills with respect to family patrimony (*bona patrimonialia vel hereditaria*), a stipulation which was not uncommon in late medieval city statutes. Everaerts had to discuss the validity of a last will of a priest who had not respected this local Hamburg statute and had bequeathed his *bona patrimonialia* for a pious cause. In his *consilium*, Everaerts again did not question the right of the town's authorities to regulate testamentary legal practice. Based on the learned legal literature, Everaerts developed, however, a few criteria which had to be met in order for such a statute to be valid. First, it had to be enacted by a competent authority. Secondly, it had to concern goods that fell within the jurisdiction of that authority. Thirdly, the statutory regulation had to be in favour of the *bonum commune*, the common good. Fourthly, the statute should never completely take away the testamentary freedom. Fifthly and finally, it should not unduly limit the freedom of the Church (*libertas Ecclesiae*). According to Everaerts, in the specific situation of the Hamburg town law, all five conditions had been met. The statute had been drafted by the city government and had even been confirmed by emperor Frederick III (r. 1452-1493).[40] It concerned goods situated in the city of Hamburg, and thus within the competence of the city government. The consolidation of the family and, for that matter, the support of the family as the nucleus of the *respublica* of Hamburg were considered values which were in favour of the common good.[41] The statutes did not completely exclude the testamentary freedom in that testamentary bequests with regard to acquired goods and fruits of patrimonial property remained possible.[42] Finally, a right balance between the ecclesiastical freedom and the town's interest had been struck.[43]

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[40] N. Everardi, *cons.* 71, p. 200, nr. 1: '*(…) praesupposito, ut mihi est expositum, quod potestas statuendi seu condendi statuta competat dictae civitati et senatui eiusdem, et quod illustrissimus Imperator Federicus tertius praetacta statuta dictae Civitatis confirmavit: dico et concludo, quod statuta huiusmodi valeant, et vim legis habent [D. 1,1,9, Omnes populi], cum ibi notatis per Bart[olum] et Doct[ores] (…).*'

[41] N. Everardi, *cons.* 71, p. 200, nr. 3: '*Potest ergo pariformiter rationabiliter statui pro confirmatione familiae et reipublicae, quod bona patrimonialia seu haereditaria ad filios, et illis non extantibus ad proximiores haeredes, ac illis deficientibus ad Rempublicam devolvantur, Imperatore id statuente, vel prius per alios statutum confirmante seu ratificante, aut illi auctoritatem impartiente, quae parificantur. (…) Praeterea quod dictum statutum valeat, probatur primo ex persona statuentium: secundo ex parte rerum, super quibus statutum disponit, et tertio ex causa publicae et communis utilitatis. Prima duo per se patent; tertium deducitur, quia dictum statutum pro causa habet favorem proximorum, et illis deficientibus utilitatem Reipublicae; et sic ordinatur ad bonum commune, quare est iustum ex fine.*'

[42] N. Everardi, *cons.* 71, p. 200-201, nr. 6: '*Nec aliquo modo dictum statutum impedit piam causam, cum permittat de bonis acquisitis expresse et de fructibus huiusmodi bonorum haereditariorum tacite quia non vetat, libere disponi: cum ergo dictum statutum disponat, deficientibus filiis et haeredibus, bona haereditaria devolvi debere ad rem publicam, in hoc disponit principaliter in favorem Reipublicae ob onera eiusdem Reipublicae supportanda (…).*'

[43] N. Everardi, *cons.* 71, p. 201, nr. 6-7: '*(…) et sic dictum statutum non potest dici in fraudem libertatis ecclesiasticae vel piae causae editum: quia licet in quaesitis laici nullo ingenio possunt*

3. Validity requirements

a. Validity requirements and the duty to inform oneself

In the previous section, we have explained how testamentary freedom was a key value to the Leuven law professors De Lacu and Everaerts in the late fifteenth and early sixteenth centuries. In order to ensure, however, that the contents, the date, as well as the provenance of a document entailing a last will would be considered trustworthy, already in Roman Antiquity several requirements for the validity of last wills had been developed. Many of those requirements were taken up and received by the authors of the *ius commune* tradition, even if some of them were mitigated under the influence of canon law.[44]

These validity requirements were often of a quite technical nature. It is not excluded that people who had not been trained in the law, might have been confused about them. In *consilium* 15, Everaerts acknowledged this fact, but at the same time made it very clear that ignorance of the law could not be an excuse if there were jurists in the neighbourhood to whom one could go for advice: 'Just like women or farmers go to a forest to get wood, and to the town to get an indulgence, thus, they should also go to the lawyers for their advice'.[45] The learned law, as it was taught at the universities, was – in the Low Countries of the late fifteenth century – no longer a mere ornament, but had consequences for daily life.

b. Substantive validity requirements

One of the traditional validity requirements for last wills, received from Roman law, was that of an appointment of a testamentary heir (*institutio heredis*). In Roman law,

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derogare ecclesiis vel iuribus ecclesiarum, ut in [X. 1,2,10, Ecclesia sanctae Mariae] et [VI. 3,23,5, Eos qui], tamen in acquirendis, si laici hoc non faciant malo ingenio, sed bono, et principaliter ut sibi prosint, non ut piae causae obsint, hoc possunt.'

[44] See, for instance, recently, with further references: T. Rüfner, "Testamentarische Erbfolge" ["Testamentary Succession"], in: U. Babusiaux *et al.* (*eds.*), *Handbuch des römischen Privatrechts* [*Handbook of Roman Private Law*], Tübingen, 2023, p. 1311-1328; S. Lohsse, "Klage aus Testament (*actio ex testamento*)" ["Testamentary Claim"], in: *Ibidem*, p. 2661-2690; S. Rigaudeau, *Le testament en droit canonique*.

[45] N. Everardi, *cons.* 15, p. 57, nr. 33: '*Quia dico, prout dixit do[minus] Io[annes] de Imo[la] in [X. 3,26,16, Raynutius] quod debet sibi imputare testator, si non consuluit peritiores, et si non adhibuit notarium petitum: cum iura debeant ab omnibus sciri [C. 1,14,9, Leges sacratissimae]. Sicut enim mulieres vel rustici vadunt ad nemus vel sylvam pro lignis, et ad civitatem pro indulgentiis, ita debent ire ad Iurisperitos pro consiliis: nec alias excusantur, quando id non est difficile propter loci vicinitatem, ut in casu praesenti: ita ad literam dicit Bald[us] et post eum Salic[etus] et novissimi in [C. 6,9,6, Iuris ignorantiam], imo plus dixit singulariter Bald[us] in [C. 6,9,6, Iuris ignorantiam], et sequuntur omnes Doctores, ibidem videlicet*.' For a discussion of the consequences of ignorance of the law in the learned legal tradition, see also, with further references: W. Druwé, "Rechtsonwetendheid (*ignorantia iuris*) in het geleerde recht" ["Legal Ignorance in Learned Law"], in: E. S. van Aggelen (*ed.*), *Informatie en recht. Diverse rechtsperspectieven* [*Information and Law. Diverse Legal Perspectives*], Antwerp, 2021, p. 1-21.

patrimony devolved either *ab intestato* or through a last will, in principle not through a combination of both systems. That is why every last will also had to provide a solution for the liabilities of the testator. The appointed testamentary heir(s) succeeded the testator in (a proportionate part of) all assets and liabilities which had not been bequeathed through specific bequests (*legata*). Several rules ensured that the testamentary heir would not be left totally disadvantaged (*i.e.* without the assets, but with all liabilities). Moreover, Justinianic law – which was received and commented upon in the late Middle Ages – also determined that some of the *ab intestato* heirs necessarily had to be included among the testamentary heirs.[46]

In his *consilia* 15 and 26, which both concerned the same case, Everaerts had to interpret these regulations. A daughter had married without paternal consent. Her father had not provided her with any dowry. In her father's last will, she had not been instituted as a testamentary heir; she only received a testamentary bequest of thirty *librae*. According to Everaerts, the daughter had a right to claim a dowry and could not be left without one. Everaerts was however willing to consider the testamentary bequest as a (belated) dowry. But even if that testamentary bequest could be interpreted as a dowry, the daughter would still have a right to a legitimate portion (*portio legitima*) of the inheritance as well. The beneficiaries mentioned in the last will had countered the daughter's argumentation by referring to a local statute which stated that a dowry was to be considered as a daughter's legitimate portion. Everaerts stressed that such a statute had to be interpreted in conformity with *ius commune*; a dowry could only be considered equivalent to the legitimate portion if the amount of the dowry was at least equal to the *portio legitima* that was due.[47]

Moreover, Everaerts also made a more principle-based argument. An *ab intestato* heir who had a right to a legitimate portion (such as a legitimate child of the testator, but also – in some cases – the testator's parent) should always be expressly mentioned as a testamentary heir (through an *institutio heredis*).[48] Naming

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[46] See, with further references: D. SCHANBACHER, "Beschränkungen der Testierfreiheit (*lex Falcidia* und *SC Pegasianum*)" ["Limits of Testamentary Freedom (*lex Falcidia* and *SC Pegasianum*)"], in: U. BABUSIAUX *et al.* (*eds.*), *Handbuch des römischen Privatrechts* [*Handbook of Roman Private Law*], Tübingen, 2023, p. 2724-2783; M. WIMMER, "Testamentsanfechtung (*querela inofficiosi testamenti*)" ["Contestation of a Last Will"], in: *Ibidem*, p. 1373-1417.

[47] N. EVERARDI, *cons.* 15, p. 55, nr. 20-21: '*Ad aliud autem, quo quaeritur an dicta filia potuit per suum patrem in legitima gravari, dico breviter, quod non, per textum expressum, in [C. 3,28,32, Quoniam in prioribus], quod procedit, etiam si esset statutum in loco, disponens, quod filia teneretur stare contenta quantitate sibi a patre relicta pro dote. Illo enim statuto non obstante, gravari non posset aliquo onere respectu quantitatis sibi per patrem relictae pro dote, secundum Iacobum Butrigarium, Baldum, Paulum de Castro et Doctores in [C. 3,28,32, Quoniam in prioribus]; unde si pater relinquat filiae minus quam legitimam, agere potest filia ad supplementum legitimae: textus est apertus in [C. 3,28,30, Omnimodo] quod procedit, etiam si pater in testamento prohibuit plus peti, ut in casu praesenti (…).*'

[48] Cf. N. EVERARDI, *cons.* 133, p. 323, nr. 14: '*Quarto est praemittendum quod sicut legitima est relinquenda descendenti iure institutionis (…), ita et ascendenti relinquenda est legitima iure institutionis, alias testamentum est nullum (…).*' To found this claim, reference is made *inter alia* to Bartolus, Jacobus de Bellapertica, Joannes de Imola, Angelus, Paulus de Castro, Baldus, Phillippus

someone as a testamentary heir (*heres institutus*), rather than merely as the beneficiary of a testamentary bequest (*legatarius*), had at least one important legal consequence: if one of the other beneficiaries would refuse the inheritance, their share in the inheritance would be distributed among the existing heirs, a system which in legal language is often referred to as the *ius accrescendi*. A second reason for requiring an *institutio heredis* rather than a mere *legatum* was of a more social nature; it was considered a dishonour if a legitimate child was not named an heir (*heres*). That is why, even if the *legatum* would concern a sufficiently high amount that was equivalent to the legitimate portion, still it could not serve as a relevant alternative to a true *institutio heredis*. The non-inclusion of an *institutio heredis* was therefore always interpreted as a disinheritance (*exhaeredatio*). An *exhaeredatio* was only possible in one of fourteen *causae exhaeredationis* included in the learned legal literature. Marrying without parental consent was not included in this exhaustive list of reasons for disinheriting one's daughter.[49] That the father, who had drafted the last will, had not known of this requirement of a formal *institutio* was an argument that could not be upheld. Nonetheless, in some cases, an invalid last will could, if it contained a *clausula codicillaris*, be re-interpreted as a universal *fideicommissum*. Even in the absence of such a codicillary clause the testamentary bequests (*legata*) could be enforced separately, as Everaerts claims with a clear reliance on the softer validity requirements of canon law.[50]

Just like certain categories of people could not be disregarded in a last will except for some very good reasons, others could not validly receive certain types of testamentary bequests. Thus, for instance, Everaerts stressed that children born

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Francus, Salicetus, Jason, Innocentius IV, Joannes Andreae, Panormitanus and Felinus Sandeus. This *consilium* concerned the interpretation of the last will of a certain Joachim de Biron, who had been married to a certain Katharina de Lens.

[49] N. Everardi, *cons*. 15, p. 56, nr. 29-31: '*In contrarium tamen est veritas, scilicet quod huiusmodi testamentum est penitus nullum, nec meretur dici testamentum: quod breviter deduco per textum expressum in praellegato [Nov. 115,3, Aliud quoque capitulum] (…), ubi textus pro forma ad validitatem testamenti paterni iure novissimo, quicquid fuit de iure antiquo, requirit: quod filio relinquatur legitima, vel aliquid loco legitimae titulo institutionis: vel quod nominatim exhaeredetur, expressa una ex quatuordecim causis, quas nominatim et specifice subiungit: quae forma si servata non fuerit, vult, per huiusmodi testamentum, nullum praeiudicium filiis generari, et sic per illum textum corriguntur omnia alia iura, dicentia, quod sufficit relinqui quoquo relicti titulo: ita firmat ibi glos[sa] ordinar[ia] et post eum Bartol[us] et idem Barto[lus] plenius in Authen[tica] de triente et semissis in principio collatione 8 ubi inter alia dicit, quod propter duas rationes filius debet habere legitimam iure institutionis, scilicet propter ius accrescendi, et quia ille titulus est honorabilior*.' In support of this statement, Everaerts refers *inter alia* to the ordinary gloss to X. 3,26,16 (*Raynutius*) and VI 3,11,1 (*Si pater*), as well as to Joannes de Imola, Alexander de Imola, Bartolus, Baldus, Jacobus de Arena, Petrus de Bellapertica, Cynus de Pistoia, Paulus de Castro, Salicetus, Joannes Faber, Jason, and Ludovicus de Roma. Cf. also, on the same case, with a similar argumentation: N. Everardi, *cons*. 26, p. 91-93.

[50] N. Everardi, *cons*. 133, p. 324, nr. 18: '*Quia dico, quod licet forte dicta dispositio testamentaria sit nulla, quoad institutionem et substitutionem vulgarem, ut supra dixi, tamen clausula codicillaris in ea posita operatur, ut institutio directa convertatur in fideicommissum universale, ut latius declarabo infra. Et quanquam in dicta dispositione testamentaria non fuisset apposita clausula codicillaris, tamen ex illa dispositione testamentaria deberentur legata (…).*' For a further development of this argument, see: Ibidem, p. 325, nr. 24.

in adultery could not validly receive any property from their father through a specific bequest; at most, a life annuity by way of alimentation could be granted. A *legatum* in favour of one's adulterous child was null and ineffective, so stated Everaerts in a letter which he wrote in Mechelen on 31 January 1508 to justify a decision which he had taken earlier in second instance in his capacity as dean of Anderlecht in the case of Philippus de Groote and his wife against Johannes Verhulst and the executors of the last will of a certain Johannes van Ghestele. He had to justify his decision, as appeal had been lodged with the prior of Coudenberg against his sentence.[51] Elsewhere, Everaerts stressed that a spurious child could only validly receive bequests from his or her father if those bequests were equivalent to a dowry or alimentation.[52] Franciscan brothers, too, could not validly receive several immovable goods or annuities through last wills or bequests.[53]

c. Formalities

Apart from these substantive validity requirements, *ius commune* also imposed some formalities that had to be complied with on pain of nullity. One of the most debated formal requirements was that of a sufficient amount of witnesses.[54] In Roman law, a minimum of five (for codicils) or seven witnesses (for formal testaments) was required, whereas canon law only required two witnesses and the presence of a priest or ecclesiastical notary. Everaerts, in line with the *communis opinio* among canonists, was in favour of a rather wide scope of application of the canon law requirement. In his interpretation, canon law did not only apply to all testaments by clerics or to testaments in which Church property was bequeathed, but also to all last wills which included a pious bequest. This wide scope of application meant that in the Low Countries usually the canon law requirements prevailed in practice. On what had to happen in case of last wills by lay persons that did not include a pious bequest (and did not concern Church property), Everaerts was ambiguous. Thus, in his *consilium* 138, he argued that, in such a case, the more stringent Roman

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51 N. Everardi, *cons.* 156, p. 371, nr. 2: '*Secundo certum est quod licet prolibus adulterinis relinqui possint alimenta de benignitate iuris canonici [X. 4,7,5, Cum haberet], tamen illa alimenta cum vita finiuntur [D. 2,15,8, Cum hi] et sic proprietas eis non debetur, nec deberi potest, secundum Baldum hoc in terminis expresse ponentem in [C. 6,42,14, Ea quam]*.'

52 N. Everardi, *cons.* 220, p. 496, nr. 5: '*Quia dico primo, quod filia spuria bene est capax legati, sibi a patre relicti pro dote seu in subsidium matrimonii, sicuti est capax alimentorum, ita vult Bartolus in [D. 34,9,26, Si vivo testatore] (…) et Panormitanus in [X. 4,7,5, Cum haberet] et sic cessat argumentum*.'

53 N. Everardi, *cons.* 160, p. 376, nr. 3: '*(…) fratres minores non sunt capaces legatorum, quando fiunt in fraudem [Clem. 5,11,1, Exivi], et dicuntur fieri in fraudem, quando testator reliquit plura immobilia vel redditus annuos, de quibus non disposuit, quorum fratres minores sunt incapaces [Clem. 5,11,1, Exivi]*.'

54 N. Everardi, *cons.* 125, p. 304, nr. 2: '*Ubi certus numerus testium est de substantia actus, et de forma probationis, ut in testamentis et codicillis, omissio substantialis formae vitiat [C. 6,23,12, Si unus]*.'

legal requirements remained fully applicable.[55] In *consilium* 171, however, he mentioned that in the lands where customary law was applied (*in patria consuetudinaria*), like in that case the county of Zeeland, a minimum of two witnesses sufficed.[56]

Even if the somewhat looser formalities of canon law were usually applied, the requirement of at least two witnesses still led to legal questions. In the case that was dealt with in Everaerts' *consilium* 89, a notarial deed which contained a last will, had been signed by the notary and by two witnesses. One of those witnesses had died, whereas the other witness testified against the deed and said not to recognize it. According to Everaerts, the mere good name, reputation and experience of the notary, in such a case, did not suffice as proof.[57] The deed was therefore to be considered ineffective; the succession consequently had to devolve according to the *ab intestato* regime. A similar reasoning was found also elsewhere in Everaerts' *consilia*.[58]

In *consilium* 116, Everaerts dealt with a notarial deed containing a last will, this time signed by the required number of witnesses. The problem was, however, that one of the witnesses was an excommunicated person, and that therefore one of the *ab intestato* heirs argued that this witness should not be considered a trustworthy one, and that therefore the required number of witnesses was not met after all, and that the last will was thus null and void. Everaerts, probably acting as an advisor to a beneficiary of the last will, responded that an excommunicated person could be habilitated by the notary. The mere fact that the notary had knowingly admitted the excommunicated witness, should be considered as an approval (*approbatio*) of that witness.[59]

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55 N. Everardi, *cons.* 138, p. 339-340, nr. 6: '*Ius civile requirens septem testes in testamento, et in codicillis quinque, non est immutatum, secundum communem opinionem, a qua in iudicando non est recedendum, nisi in relictis ad pias causas, ut in [X. 3,26,11, Relatum], vel quando testamentum conditur per ecclesiasticos, vel laicos in terris ecclesiae, servata forma [X. 3,26,10, Cum esses], puta, quando fieret coram presbytero parochiali, et duobus vel tribus testibus fide dignis et idoneis; ita expresse volunt Johannes Andreae, Cardinalis Petrus de Anchorano et post eos late dominus Ioannes de Imola in [X. 3,26,10, Cum esses].*' This consultation concerns the last will of a certain Johannes de Bijn, the first husband of Elizabet van Vloersem. The last will was written on 19 October 1493.

56 N. Everardi, *cons.* 171, p. 396, nr. 8 (where this reasoning was also extended to *donationes mortis causa*): '*Quia respondetur, quod ubi consuetudo patriae habet, quod testamentum valeat coram duobus testibus similiter debet et valere donatio causa mortis. Et pro hoc facit bona ratio, quia si testamentum, quod de iure non valet, nisi adhibitis septem testibus, valeat de consuetudine cum duobus testibus, multo magis debet valere donatio causa mortis, et ita expresse tenet Baldus in [C. 6,23,31, Et ab antiquis]. Si ergo casus praenarratus accidit in patria consuetudinaria, ubi testamentum valet coram duobus testibus, nihil stringit dictum argumentum.*'

57 N. Everardi, *cons.* 89, p. 236, nr. 3: '*Nec obstat quod notarius qui huiusmodi instrumentum subscripsit, fuit vir probus in reputatione hominum, quia hoc non sufficit ad instrumenti validitatem per eum confecti, quia solemnitas et efficacia instrumenti non solum dependet ex probitate notarii, sed etiam ex numero testium (…), alias non requirerentur testes in instrumento, si sola probitas notarii sufficeret.*'

58 N. Everardi, *cons.* 125, p. 304, nr. 4: '*Non obstat etiam, quod de legalitate notarii adducitur, quia dico quod fides instrumenti non procedit a tabellione duntaxat, etiam si esset legalissimus, sed procedit connexe a tabellione et testibus inscriptis, ut dicit idem Baldus in [C. 4,21,5, In exercendis].*'

59 N. Everardi, *cons.* 116, p. 292, nr. 11: '*Imo secundum Innocentium in [VI. 2,12,1, Pia], non vitiatur instumentum etiam si unus testium sit excommunicatus: et idem tenet et sequitur Speculator*

The requirement of a sufficient number of witnesses was, however, not the only formality which was foreseen on pain of nullity. The same was true for the exact mention of the date[60], and – in case of a chirograph testament written by a father in favour of his children – for the reading or publication of the last will.[61] Care should be taken not to consider a draft version of a last will as a formal one.[62]

4. Conclusion

This contribution has presented a few *consilia* by two Leuven law professors from the late fifteenth and early sixteenth centuries, Robertus de Lacu and Nicolaas Everaerts, on the law of last wills. Both authors were well aware of the value of testamentary freedom, which was derived from Roman law and implemented in canon law as well. In their learned legal advice on concrete cases, they frequently referred to this *libera testamenti factio* or *libertas testandi*. That parties to judicial proceedings were willing to pay for the professors' learned advice, shows that this learned legal discourse on the *libertas testandi* was also considered useful; Roman and canon law were deemed relevant in the legal practice of the Low Countries. Everaerts, who as dean of Anderlecht and later as a member and president of the Court of Holland and the Great Council of Mechelen had been a judge himself, was well aware of this importance of the *ius commune* and of the expertise of the learned lawyers. In the presence of so many trained jurists, ignorance of the law (*iuris ignorantia*) should no longer be invoked as an excuse (*cf. cons.* 15).

Consilia were thus undoubtedly relevant in the cases for which they have been written, even if in the end the court might of course have decided not to follow the learned lawyer's argumentation. Given the scarcity of academic literature from the Low Countries in the late fifteenth and early sixteenth centuries, and given the primary focus of this scarce academic literature on the mere explanation of fragments from the *Corpus iuris civilis*, the *consilia* offer invaluable information on

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(…) et Joannes Andreae in [VI. 5,11,8, Decernimus]. Et ratio est, quia ex quo ipsum testem adhibuerunt, videntur eius personam approbasse.'

60 N. Everardi, *cons.* 155, p. 369, nr. 4-5: '*Primo, quia in ea non est tempus, quod de iure requiritur etiam in testamento inter liberos scripto manu patris (…), et est ratio, quia testamentum pluries fieri et mutari potest, unde est necesse, quod appareat de tempore: quia illud est ratum, quod est ultimum [C. 6,23,19, Omnium], cum similibus. Fortius ergo hoc requiritur in testamento ad pias causas, quia liberi magis sunt privilegiati et favorabiles, quam pia causa, ut probatur in [C. 17 q. 4 c. 1, Quicumque]*.' This consultation concerns the last will of a certain Joannes Maket.

61 N. Everardi, *cons.* 155, p. 369, nr. 7: '*(…) quia dicta schedula non reperitur lecta, vel publicata, quod etiam requiritur in testamento inter liberos scripto manu propria patris, secundum Salicetum et Doctores (…) et sequitur Alexander de Imola (…) et est de mente Baldi (…).*'

62 N. Everardi, *cons.* 155, p. 369, nr. 8: '*Modo ita est, quod dispositio ad testandum non est testamentum: sicuti scriptura quam iudex concipit pro formanda sententia, non est sententia, sed quaedam praevia dispositio ad sententiam [C. 7,44,2, Hac lege] et ita pulchre in similibus terminis consuluit Oldradus de Ponte in consilio 119, incipiente 'Titius condidit testamentum'.*'

how the learned law was confronted with particular law and how it was used to help shape and influence local judicial practice. Moreover, the relevance of the *consilia* by De Lacu and Everaerts, studied in the present contribution, also transcended (at least somewhat) that of the specific case for which they have been written. The *consilia* by De Lacu were found in manuscript volumes that belonged to the Congregation of Windesheim and to the Antwerp notary Van der Blict; thus, they might have had a certain albeit maybe limited impact on future cases involving either the Windesheimer Congregation or Van der Blict.

The *consilia* by Everaerts were printed multiple times, over a period of more than a century, were read in several regions by students and practitioners alike, and have thus undoubtedly influenced several generations of learned jurists, not only in the Low Countries, but also abroad. Earlier research has shown that Everaerts' *consilia* were frequently quoted by later authors.[63] The extent to which also the *consilia* mentioned in this contribution have been cited by future generations of jurists, requires further research.

Everaerts and De Lacu interpreted testamentary freedom quite broadly. They were sceptical towards contractual promises which limited testamentary freedom, even if they tried to reconcile those promises with the *libertas testandi* as much as possible. Stipulations that could easily have been interpreted as forbidden and invalid *pacta futurae successionis* were – insofar as possible – re-interpreted as valid and effective *donationes mortis causa*. Those donations by reason of death entailed the possibility of a unilateral retraction by the donator before his death, thus protecting testamentary freedom, without at the same time invalidating the non-retracted promises (which would have been the consequence of a qualification as a *pactum futurae successionis*). Agreements that limited the promisor's freedom to retract certain promises with postmortal effects were – according to Everaerts and De Lacu – only binding if explained in a way which was compatible with testamentary freedom, *e.g.* by interpreting a 'child's portion' as only a 'legitimate portion'; or by interpreting a clause 'not to donate, sell or transfer' as only prohibiting specific bequests but allowing for an *institutio heredis*; or still by denying the invalidating effect of certain promises on transfers of property. Joint last wills of spouses were, in line with the learned legal tradition, interpreted as two separate last wills, which were both valid but which each spouse – for his or her own part – could also at any time unilaterally retract or adapt.

Despite De Lacu's and Everaerts' emphasis on the *libertas testandi* when confronted with contrary contractual stipulations, Everaerts seems to have given much more leeway to the secular authorities to limit this testamentary freedom. Thus, although he questioned some specific procedural modalities, Everaerts did never fundamentally dispute the sovereign's entitlement to make the right of certain categories of people (such as natural children) to draw up a last will dependent on

63 W. Druwé, *Loans and Credit*, especially p. 79.

a prior *licentia testandi*. He was also quite lenient with respect to limitations on testamentary freedom provided for in local statutory law. As long as those local statutes did not completely take away testamentary freedom, and as long as they had been enacted by a competent authority in favour of the *bonum commune*, they were acceptable.

In learned law, testamentary freedom did, in and of itself, not mean that the making of last wills could not be subject to validity requirements, based either on the wish to protect certain family interests, or on a concern for the reliability of the document which was said to contain the last will of the deceased. As far as the first category of requirements was concerned, namely those aimed at the protection of the *ab intestato* heirs, Everaerts clearly advocated the somewhat more lenient approach of canon law. Even if he emphasized the obligation of a father to designate his daughter as his testamentary heir, Everaerts asserted that the absence of such a formal *institutio heredis* did not bring about the ineffectiveness of the complete last will, as the existing testamentary bequests should – to the extent possible – either be re-interpreted as *fideicommissa*, or be executed separately as valid specific bequests (*legata*). With regard to the second category of requirements, especially the number of witnesses, Everaerts usually seems to have applied a minimum number of two, either on the basis of canon law, or even – if no Church institution, pious cause or cleric was involved – on the basis of customary law. Only very seldomly (*cf. cons*. 138) did he refer to the strict Roman legal requirement of seven witnesses.

In sum, based on the *consilia* discussed in the current contribution, both De Lacu and Everaerts can be considered as champions of testamentary freedom. They tried to maximally respect the last will of the deceased, notwithstanding contrary contractual stipulations or (what they saw as) excessive validity requirements. There was one exception though: the competence of secular authorities to regulate and even limit the *libertas testandi* of their subjects was recognized, as long as the *libertas testandi* was not completely taken away.

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‘AS GOOD AS POSSIBLE ACCORDING TO THE LAWS’ TESTAMENTARY WITNESSES IN FIFTEENTH-CENTURY FRISIA

Marvin WIEGAND

Abstract – This article examines the number of witnesses present for Frisian last wills in the fifteenth century by examining both Frisian documents of last wills and written law texts. Due to various legal traditions (namely Roman and canon law) that have different requirements for the number of witnesses present, Frisian testators were often unsure which formalities to apply. Was it sufficient to create a testament according to the more simple canon law rules or should they follow the requirements of Roman law? What was a good testament according to the laws? Ultimately, the Frisians constructed their own testamentary tradition, one that had to function in their own social context. They made deliberate choices which aspects to apply, formally requiring seven witnesses in accordance with Roman law, and thereby increasingly secularizing testaments. In practice, however, last wills made according to canon law remained effective, because the practicality of allowing simple last wills overrode the strict requirements set out in the written laws.

On 25 May 1475, a Frisian named Jarich Epa Hotnya wrote his last will and testament, in which he generously donated to the churches of St. Nicholas and St. Mary in Nijland and bequeathed his wife Swobben the estate in Kee. Hotnya also made arrangements for his children, including giving his daughter Doed a part of the old estates of a person named Obba Jukema; requesting that his son Ju become a priest; and leaving all the lands that belonged to his family in Nijland and Bolsward to his son Epa. Finally, at the end of his many bequests and donations, Hotnya added this statement:

> ‘*Item disses lesta willa wol Jarich datma steed ende fest halda schel, ende duga schel in all syn articulen als een testament jeff als een codicil jeff als een oer lesta willa, als hi alderbest gued wessa mey ney dae riochten, hya sye gastelick jefta wraulsc.*’[1]

[1] G. VERHOEVEN and J. A. MOL. *Friese testamenten tot 1550* [*Frisian Last Wills until 1550*], Leeuwarden, 1994, p. 60, r. 28-31.

> (Jarich wants that this last will be held solid and that it shall be valid in all its articles as a testament or as a codicil or as another type of last will, as it may be as good as possible according to the laws, whether it be ecclesiastical or secular.)

It is evident that Jarich Epa Hotnya intended his will to be valid and enforceable, whether as a testament, a codicil, or any other form of last will. Given the existence of various types of wills, it appears that Hotnya was uncertain which one was the correct form. His intention, therefore, was to draft a will that was '*as good as possible according to the laws*', whatever those laws might be.

This contribution examines those laws, and what they specified for a last will to look like. While this can be examined from many angles, the focus has been set on the number of witnesses required for a will to be considered valid. Different legal traditions, namely Roman and canon law, had varying requirements for the number of witnesses present. By analyzing the requirements for witnesses in Frisian law, we gain insight into the legal traditions that influenced will writing in Frisia. Ultimately, we can determine whether Hotnya's own will followed these formalities.

A brief overview of Frisian society will be provided, as its unique situation influenced how and by whom the formalities for wills were decided. Additionally, this article primarily relies on written law texts rather than on the wills of the Frisians themselves. Legal texts reveal the formal requirements for the number of witnesses in theory, while wills of Frisians such as Hotnya reveal whether these requirements were followed in practice. Therefore, a summary of the relevant legal texts is provided.

1. The Frisians and their freedom

The Frisian freedom (Frisian: *Fryske Frijheid*) describes a unique political situation during the High and Late Middle Ages. The Frisian people were not serfs and feudalism did not exist in Frisia as it did in other European territories. This circumstance was called the Frisian freedom. In medieval sources it is sometimes denoted in Latin as *frisonica libertas* or in Old Frisian as *freeska fryheed*. For the Frisians this meant that they understood themselves as free from personal bondage and servitude. This freedom was so important to them that it had to be defended with their own lives. Despite this unique situation, Frisia was nominally under the rule of the Holy Roman Emperor.[2]

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[2] For literature on the Frisian freedom, see H. VAN LENGEN, R. DRIEVER and W. J. KUPPERS (*eds.*), *Die Friesische Freiheit des Mittelalters: Leben und Legenden* [*The Frisian Freedom of the Middle Ages: Life and Legends*], Aurich, 2003; J. R. G. SCHUUR, "De middeleeuwse Friese vrijheid. Een sociaal of politiek verschijnsel?" ["The Medieval Frisian Freedom. A Social or Political Phenomenon?"], *It Beaken* 67 (2005), p. 17-30; O. VRIES, "Frisonica libertas: Frisian Freedom as an Instance of Medieval Liberty", *Journal of Medieval History* 41 (2015), p. 229-248; IDEM, *Het Heilige*

Without the feudalism that developed in the rest of Europe, a unique political system of many small, independent lands (*terrae*) developed. Each land governed itself and appointed its own judges, and no central authority imposed law or a legal system. This led to a society that organized procedures locally and independently. Almost all legal sources were local and regional customs, which were eventually recorded by Frisian jurists. Whenever elements of learned law were received into Frisia, it can be assumed that it was the Frisians themselves that adopted or adapted them, rather than a legislative authority that imposed them.

Ultimately, internal developments led to the disintegration of the Frisian freedom. Over the fourteenth and fifteenth centuries, conflicts between two powerful factions – the *Schieringers* and *Vetkopers* – escalated violently. The *Schieringers* approached Albert III of Saxony (1443-1500) for support. In exchange for his help Albert became governor of Frisia in 1498, thus ending the Frisian freedom.[3]

The period of Frisian freedom holds great significance for examining Frisian law in the fifteenth century. During this time, there was no governing authority present to issue legislation, and therefore all Frisian law was based on recorded customs. When it comes to how Frisians created their last wills, they did so in accordance with general customs and practices. Any changes observed in the way testaments were drawn up could only have originated from the Frisians themselves.

2. The Frisian sources

Before we can begin to analyse the Frisian legal texts regarding the writing of wills, a brief and chronological overview of some of those sources is necessary.

a. The Freeska Landriucht

The *Freeska Landriucht* is a compilation of traditional, indigenous legal texts and a regional codex for Frisia west of the river Lauwers, an area known as Westerlauwers Frisia, corresponding to the present-day Dutch province of Friesland (*Fryslân*). It contains texts that are specific to Westerlauwers Frisia; and texts that are

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Roomse rijk en de Friese vrijheid [*The Holy Roman Empire and the Frisian Freedom*], Leeuwarden, 1986, p. 14-27. On the history of Medieval Frisia, I refer to the following literature: O. Vries, "Geschichte der Friesen im Mittelalter: West- und Ostfriesland" ["History of the Frisians in the Middle Ages: West- and East-Frisia"], in: H. Haider Munske (*ed.*). *Handbuch des Friesischen* [*Handbook on the Frisians*], Tübingen, 2001; Idem, *Het Heilige Rooms Rijk*.

[3] Idem, *Het Heilige Rooms Rijk*, p. 162-188. About the conflict between the chieftains and the *Schieringers* and *Vetkopers*, see J. A. Mol, "Hoofdelingen en huurlingen. Militaire innovatie en de aanloop tot 1498" ["Chieftains and Mercenaries. Military Innovation and the Prelude to 1498"], in: J. Frieswijk (*ed.*), *Fryslân, staat en macht 1450-1650. Bijdragen aan het historisch congres te Leeuwarden van 3 tot 5 juni* [*Frisia, State and Power 1450-1650. Contributions to the Historical Conference in Leeuwarden, 3-5 June*], Hilversum, Leeuwarden, 1999.

more generally Frisian and appear in other regions as well.[4] The *Freeska Landriucht* consists of twenty-one separate texts. Of most texts the age cannot be determined very accurately, so approximations are given. In general, they range from the eleventh to the fourteenth centuries, with some provisions dating as far back as the tenth century. The following three texts of the *Freeska Landriucht* are mentioned in this article.

The Older Skelta Law (henceforth: *SkRa*) contains eighty-one provisions and was written in the eleventh to twelfth centuries in Westerlauwers Frisia. *The Older Skelta Law* remains of great importance for the history of Frisian law because of the inclusion of procedural law.[5]

The Book of Emperor Rudolf (henceforth: *Rud*) is a thirteenth-century text, which was central in the pseudo-historical account of the Frisian freedom during the Middle Ages. It contains chronicles of laws, heroic deeds, and the privileges granted to the Frisians.[6] However, it is unknown which emperor 'Rudolf' the name refers to.[7] The text is influenced by canon law. The version in the *Freeska Landriucht* is the only known version that is provided with Latin glosses.[8]

The Statutes of Opstalsbam (henceforth: *WUps*) contain twenty-four clauses concerning rules for the whole of Frisia. Compared to the other texts, the statutes are relatively recent, being the result of the League of Opstalsbam in the early fourteenth century. The league was formed by Frisians from the Vlie to the Weser in response to outside pressure on the Frisian freedom.[9]

What makes the collection of these legal texts in the *Freeska Landriucht* so significant is the addition of a Latin gloss. There are a total of 188 individual glosses, with allegations to both canon and Roman law. These glosses are not evenly distributed among the legal texts or the provisions. Rather, they are placed where the author or authors felt the commentary was appropriate. Studies of these glosses

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4 O. Vries, "Thet is ac londriucht. Landrechte und Landrecht im mittelalterlichen Friesland" ["Thet is ac londriucht. Land Laws and Land Law in Medieval Frisia"], *Amsterdamer Beiträge zur älteren Germanistik* [*Amsterdam Contributions to Older Germanic Studies*] 73 (2014), p. 585.

5 H. D. Meijering and J. A. Nijdam, *'Wat is Recht?' De receptie van Oudfries recht in de Groninger Ommelanden in de 15e en 16e eeuw: Een editie met vertaling* ['*What is Law?' The Reception of Old Frisian Law in the Groninger Ommelanden in the 15th and 16th Centuries: An Edition with Translation*], Gorredijk, 2018, p. 84. See for additional literature: O. Vries, *Asega, is het dingtijd? De hoogtepunten van de Oudfriese tekstoverlevering* [*Asega, is it Assembly Time? The Highlights of Old Frisian Textual Transmission*], Leeuwarden, 2007, p. 62. An older, English examination in S. Fairbanks, *The Old West Frisian Skeltana Riucht*, Cambridge, 1939.

6 H. S. E. Bos-Van der Heide, *Het Rudolfsboek*, Assen, 1937, p. 11. See there for the three editions of the book and further insights.

7 H. D. Meijering and J. A. Nijdam, *'Wat is Recht?'*, p. 427.

8 P. Gerbenzon, *Apparaat voor de studie van Oudfries recht. II: Bronnen* [*Apparatus for the Study of Old Frisian Law. II: Sources*], Groningen, 1981, p. 59.

9 O. Vries, *Asega, is het dingtijd?*, p. 64.

suggest that at least a significant number of them might trace back to a manuscript tradition.[10]

The *Freeska Landriucht* was printed and published around 1485.[11] The content of the gloss was created sometime in the thirteenth and fourteenth centuries, since it contains references to jurists and canonists of that period. They are probably not much younger than the end of the fourteenth or the beginning of the fifteenth century. This is supported by the lack of references to relevant authors from the fifteenth century. The most recent canonist that is included, is Nicolò de' Tudeschi (Abbas Panormitanus, 1386-1445).[12]

b. The *Rechten ende Wilkoeren*

The *Rechten ende Wilkoeren* (henceforth: *RW*) is a law book that was written in the late fourteenth century in Frisia.[13] The authors of the *Rechten ende Wilkoeren* aimed to combine traditional Frisian law with learned law. The text contains many instances where Roman and canon rules appear in the Old Frisian language in the provisions.[14]

c. The *Excerpta Legum*

The *Excerpta Legum* (henceforth: *Exc*) is a collection of legal rules in Old Frisian and partly in Latin, found in the manuscript *Codex Aysma* (A).[15] It was intended to collect rules of law for a future systematic law book. However, this systemization was never finished, resulting in a lack of structure in the *Excerpta Legum*.

Multiple people were involved in this compilation, and four handwriting styles can be identified, which sometimes alternate between each other.[16] The compilers aimed to create a Frisian law book that incorporated learned law. They included only rules that they deemed relevant or valid, leading to the copying of texts from other sources. Consequently, some rules are repeatedly mentioned or contradict each other.

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10 J. Hallebeek, "The Gloss to the Saunteen Kesta (Seventeen Statutes) of the Frisian Land Law", *Tijdschrift voor Rechtsgeschiedenis* [*The Legal History Review*] 87 (2019), p. 53. Additional information about the gloss in J. A. Nijdam, J. Hallebeek and H. de Jong, *Frisian Land Law. A Critical Edition and Translation of the Freeska Landriucht*. Leiden, Boston, 2023, p. 63 ff.

11 O. Vries, "Thet is ac londriucht", p. 582.

12 On the dating of the gloss, see Nijdam *et al*., *Frisian Land Law*, p. 75 f.

13 H. D. Meijering and J. A. Nijdam, *'Wat is Recht?'*, p. 30.

14 *Ibidem*, p. 30.

15 W. J. Buma, P. Gerbenzon, and M. Tragter-Schubert, *Codex Aysma. Die Altfriesischen Texte* [*Codex Aysma. The Old Frisian Text*], Assen, 1993.

16 For additional information regarding the handwritings, the structure of Codex Aysma and the *Excerpta Legum*, see W. J. Buma *et al*., *Codex Aysma*. It also includes the transcriptions in Old Frisian and Latin, as well as the German translation. The numbering of the provisions and the German translation was the basis for the analysis of the *Excerpta Legum* in this work.

A part of the provisions collected in the *Excerpta Legum* came originally from case records. Each fragment comprises an argument or thesis in Old Frisian, along with Latin evidence of the thesis that references Frisian, canon, and Roman law. These fragments, known as *informationes iuris*, were generated during Romano-canonical procedures as defenses of arguments presented earlier in the proceedings, called *positiones*. *Positiones* were written by the parties to strengthen their own arguments and weaken those of the opposing parties. They are a key feature in canonical procedures in the Middle Ages.[17] The fragments are valuable because they provide insight into legal practice, although they do not contain the original statements or results.

The *Excerpta Legum* was compiled between 1400 and 1480, when its third redaction, the *Jurisprudentia Frisica* emerged.[18]

d. The *Jurisprudentia Frisica*

The *Jurisprudentia Frisica* (henceforth: *JF*) is a systematic rearrangement of the material collected in the *Excerpta Legum*. While it was certainly intended to be read by people other than the author, the careless rubrics and the space that was left for later additions indicate that it was not finished.[19] A large part of the provisions is copied from the *Excerpta Legum*. However, not the entire text is present. The author has selected rules and provisions that seemed appropriate. Additional material is also included, for example writings of canonists and others on learned law.[20] Tancredi da Bologna (1185-1230), Giovanni da Imola (1370-1436) and Nicolò de' Tudeschi (Panormitanus) are important. Moreover, the *Jurisprudentia Frisica* contains some traditional Frisian provisions that can also be found in the *Freeska Landriucht*.[21] This is interesting, because it shows that some traditional Frisian law remained relevant and was retained.

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17 For the canonical procedure, see J. A. BRUNDAGE, *Medieval canon law*, London, New York, 1995, p. 129-134.

18 The age of the latter is said to be from around 1481 to 1504, see P. GERBENZON, "Aantekeningen over de 'Jurisprudentia Frisica': Een laat-vijftiende-eeuwse Westerlauwers-Friese bewerking van de 'Excerpta Legum' (Eerste deel)" ["Notes on the 'Jurisprudentia Frisica': A Late Fifteenth-Century Westlauwers-Frisian Edition of the 'Excerpta Legum' (Part One)"], *The Legal History Review* 57 (1989), p. 32. About the dating of the first edition of the *Excerpta Legum*, see IDEM, *Excerpta legum: onderzoekingen betreffende enkele Friese rechtsboeken uit de vijftiende eeuw* [*Excerpta legum: Studies concerning some Frisian Law Books from the Fifteenth Century*], Groningen, Jakarta, 1956, p. 383ff. W. J. Buma *et al*. place the date for it in the second half of the fifteenth or the first half of the sixteenth century, see W. J. BUMA *et al*., *Codex Aysma*, p. XII.

19 P. GERBENZON, "Aantekeningen over de 'Jurisprudentia Frisica' (Eerste Deel)", p. 32-34 and 61.

20 IDEM, "Aantekeningen over de 'Jurisprudentia Frisica': Een laat-vijftiende-eeuwse Westerlauwers-Friese bewerking van de 'Excerpta Legum' (Tweede Deel)", ["Notes on the 'Jurisprudentia Frisica': A Late Fifteenth-Century Westlauwers-Frisian Edition of the 'Excerpta Legum' (Part Two)"], *The Legal History Review* 57 (1989), p. 350 ff.

21 See IDEM, "Aantekeningen over de 'Jurisprudentia Frisica' (Tweede Deel)" for a comprehensive analysis of the sources used in the *Jurisprudentia Frisica*.

The *Jurisprudentia Frisica* is dated to the end of the fiftheenth century. Gerbenzon argues that its content was created from 1481 on, and the manuscript was written in the time between 1490 and 1504.[22] This means that this manuscript was created at about the same time as the publication of the *Freeska Landriucht*.

3. Last wills in classical Frisian law

Traditional Frisian law, like other Germanic laws, was unfamiliar with testaments as a means of organizing succession and distributing property. Instead, all goods and lands were inherited *ab intestato*, in accordance with customary law.[23] Frisian succession law was not fixed in written law but was based on the principle of '*whoever is closest related (sibst) to the deceased then, shall take the inheritance (lawa)*'.[24] The closest relatives were known as the 'six hands', comprising the mother, father, sister, brother, daughter, and son of the deceased, and they inherited the estate *ab intestato*.

Despite the customary practice of intestate succession, Frisians had two main reasons for making wills or will-like acts. Firstly, they were interested in providing for their own salvation by making donations to charitable institutions. Secondly, they wanted to organize succession and distribute property according to their own wishes.[25]

Wills or will-like acts have been documented in Frisian sources from the thirteenth century onwards.[26] The *Book of Emperor Rudolf* and the *Statutes of Opstalsbam* mention acts performed in the presence of a priest in the last hours, indicating that such death-bed decisions were made in accordance with ecclesiastical formalities.[27] The *Statutes of Opstalsbam* state that all inheritances are distributed according to intestate succession, unless a decision in the last hours was made.

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22 IDEM, "Aantekeningen over de 'Jurisprudentia Frisica' (Eerste Deel)", p. 32.

23 See about customary Frisian succession, E. M. MEIJERS, "Het Friese en het Drentse erfrecht en huwelijksgoederenrecht" ["Frisian and Drenthe Inheritance Law and Matrimonial Property Law"], *Akademie Dagen* [*Academy Days*] 2, (1949), p. 54.

24 This principle is mentioned in the *Twenty-Four Land Laws*, see *D*, VIII (L^{24}) 16, in NIJDAM *et al*., *Frisian Land Law*, p. 234-235.

25 Compare also S. EPSTEIN, *Wills and Wealth in Medieval Genoa, 1150-1250*, Cambridge, 1984, p. 136-137.

26 C. M. CAPPON, "De erfstelling in de Friese testamenten tot 1550. Een plaatsbepaling" ["The Institution of Heirs in the Frisian Last Wills until 1550. A Localization"] in: J. A. MOL (*ed*.), *Zorgen voor zekerheid. Studies over Friese testamenten in de vijftiende en zestiende eeuw* [*Caring for Certainty. Studies on Frisian Last Wills in the Fifteenth and Sixteenth Centuries*], Leeuwarden, 1994, p. 51-52. The same is observed for neighboring Utrecht, see IDEM, *De opkomst van het testament in het Sticht Utrecht* [*The Rise of the Last Will in the Sticht Utrecht*], Deventer, 1992, p. 97 ff.

27 *D*, XVI (*Rud*) 5, in NIJDAM *et al*., *Frisian Land Law*, p. 384-385 and *D*, XX (*WUps*) 17, in *Ibidem*, p. 432-435 respectively.

> WUps 17: '*Dio sexteensta seeck is, dat alle lawa deer lawiget wirdet fan gode, dat se aldeer lawie deer se di daed brenghe, hit ne se dat hi* ***op syn lesta tiid mit siin biegtris*** *rede oderis ordinerie. Hwa so dat inbrect mit onriuchter wald di uerbert xx merka*'.[28]
> (The sixteenth clause is that all inheritances which consist of goods are brought there wherever death brings them, unless a man decides otherwise **in his last hours with the approval of his confessor**. If someone infringes on this with illegal force, he has to pay a fine of 20 marks).

There is no direct mention of a testament (Old Frisian: *testament*) or a last will (Old Frisian: *lesta*/*ūtersta willa*). However, the distribution of property after death is said to be according to the will of the deceased person. This could also refer to other actions enabling distribution of property after death, such as the *donatio post obitum*. Nevertheless, there is another characteristic of testamentary succession present: a person's decision overrules '*wherever death brings them* [the goods]' ('*deer se di daed brenghe'*). This provision indicates that a decision made in the last hours overrules intestate succession, which leads me to believe that it indeed refers to a last will. The mention of a priest in the role of a confessor (Old Frisian: *biechter*) indicates that canon law norms were present and applied, although there is no mention of the number of witnesses required.

a. Last wills in the gloss to the *Freeska Landriucht*

The first, unmistakable references to last wills are found in the *Freeska Landriucht*, which contains several glosses mentioning Roman law in connection with testaments.[29] Within these glosses, all references to learned law concerning testaments are exclusively to Roman law. This is surprising, considering that the earliest wills were probably drawn up according to canon law, as we saw above. Consider, for example, this gloss to the *Older Skelta Law*.

> SkRa 52: '*Dit is riucht: jefter een ovirlandich man sterft, so aech di frana dat gued to ontfaen jeer ende dey to haldene. Jof deer enich eftercomt fan syn eerven binna jeer ende binna dei, dae eerfnamen toe jaen. Jef deer nimmen comt: di frana nym een deel ende di ora deel to Godes tyenst*'.
> (This is the law: if a foreigner dies, the frana shall take custody of his goods and keep them for a year and a day. If any of his heirs come for them within a year and a day, he shall give them to the heir. If no-one comes then the frana takes half and the other half goes to the church).

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28 *D*, XX (*WUps*) 17, in NIJDAM, et al., *Frisian Land Law*, p. 432-435.

29 These glosses are gloss 41 ad *D*, III (*SkRa*) 52, in *Ibidem*, p. 146-149; gloss 53 ad *D*, III (*SkRa*) 71, in *Ibidem*, p. 160-161; gloss 173 ad *D*, XVI (*Rud*) 5, in *Ibidem*, p. 384-385.

> Glossa 41: '*Ende di ora deel to goedes tyenst Item libere apud eos qui uolunt sponte suscipere liberam habeant testandi facultatem, dummodo legittime testentur, C. de ino. testa. l. Si quando et nota de sacrosanctis et l. 1*'.[30] (Gloss 41. *Ende di ora deel to goedes tyenst* Likewise, it is at the discretion of those who wish to do this by their own free will, that they have the free competence to make a last will and testament, as long as they do so in a legitimate way, see [C. 3,28,35, *Si quando*] and notice [C. 1,2,1, *Habeat unusquisque*])

The main text (*SkRa* 52) concerns succession by a foreigner. Consequently, it may be argued that the assertion that a testament can be made to organize succession only applies to foreigners. However, it is implausible that a testament was only available to foreigners given the presumed existence of wills from the thirteenth century sources onwards. Rather, a testament is presented as a valid alternative to intestate succession for all, not just foreigners.

It is noteworthy that both allegations in the gloss reference Roman law, which is unusual given previous sources implied that the earliest wills were made according to canon law. This could indicate a shift towards testaments being governed by secular norms. Additionally, the Frisian text identifies the *frana*, a secular magistrate, as the competent authority for succession.

Both references agree on a right to make a testament. In the first allegation (C. 3,28,35, *Si quando*) we find a very similar phrase as in the gloss: '[…] *nisi ut habeat consuetam et legitimam testamenti factionem […]*'. The second allegation (C. 1,2,1, *Habeat unusquisque*) concerns the testamentary right in context of leaving of property to the Church. People are free to leave property to this institution because they are free to make a will.[31] That this particular provision is referenced, may indicate that the making of wills and the bequeathing of one´s assets in those wills still primarily took place in favour of charitable, ecclesiastical institutions.

Neither in the text nor in the references can we find any information or details on how a testament was to be made 'in a legitimate way'. The same applies to the other glosses that mention testaments, which provide no formalities for drawing up a will and exclusively reference Roman law. It is possible that Roman norms were to be applied based on the predominance of Roman law in the glosses. However, no formalities of Roman law are mentioned here. Conversely, if canon law still supplied the only valid norms for last wills, the absence of any references to canon law is equally puzzling.

In conclusion, it is uncertain why the allegations in the gloss to the *Older Skelta Law* in the *Freeska Landriucht* only refer to Roman law. It seems most plausible that there was indeed an intention to create a secular testament within the gloss. In that case, the nearest source of secular norms for a testament could be

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30 *D*, III (*SkRa*) 52, in *Ibidem*, p. 146-149.

31 C. 1.2.1: '*Nihil est quod magis hominibus debetur, quam ut supremae voluntatis*'.

found in Roman law. Yet, the lack of details indicates that the authors of these glosses were still far removed from applying Roman law. Rather, the glossators intended to include testaments within secular law, but did not detail which specific formalities were to be followed.

4. Last wills in late medieval Frisia and the *ius commune*

From 1400 onwards, a considerable number of testamentary documents have survived, providing written evidence of Frisians drawing up wills. Verhoeven and Mol have compiled these documents and assert that their collection is complete.[32] Therefore, it is unlikely that many written testaments existed before the fifteenth century.[33] In total, 212 documents were found, of which two were made by Frisians outside of Frisia before the fifteenth century, 58 between 1400 and 1499, and the remaining 152 in the first half of the sixteenth century. The chart below demonstrates a steep increase in the number of Frisians making testaments over the fifteenth and sixteenth centuries, assuming that the number of surviving documents is representative of the actual number of testaments from that period.

All surviving testaments after 1400 were drawn up within Frisia. Among the 212 documents, some could be classified as codicils in the Roman legal sense. Codicils were documents that instructed the heir to perform a specific act but required only five witnesses instead of seven.[34] These codicils were also included in the collection. In fact, all 212 documents are only similar insofar as they concern the distribution of property after death.[35] Testators include both men and women, with an overrepresentation of wealthy people who would have had property to distribute. This is also apparent in the high number of testators from influential Frisian families, such as Camminga and Camstra.[36]

One of these 212 documents is the will of Jarich Epa Hotnya. Hotnya was unsure which form his document had to take to be valid and hoped that it could be valid either as 'a testament or as a codicil or as another type of last will'. It is likely that these options refer to various possible forms of wills, namely the Roman *testamentum*, the codicil, or the canonical last will.

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32 G. VERHOEVEN and J. A. MOL, *Friese Testamenten*, p. XVIII.

33 Nevertheless, Verhoeven muses that existence of earlier testaments is plausible. G. VERHOEVEN, "De beoorkonding van testamenten in middeleeuws Friesland" ["The Registration of Last Wills in Medieval Frisia"], in: J. A. MOL (*ed.*), *Zorgen voor zekerheid. Studies over Friese testamenten in de vijftiende en zestiende eeuw* [*Caring for Certainty. Studies on Frisian Last Wills in the Fifteenth and Sixteenth Centuries*], Leeuwarden, 1994, p. 13.

34 Codicils will be treated in greater detail further on in this contribution. For the codicil, see M. KASER, *Das römische Privatrecht: Zweiter Abschnitt. Die nachklassischen Entwicklungen* [*Roman Private Law. Second Section. The Postclassical Developments*], Munich, 1975, p. 495 ff.

35 For information on the collected documents and some considerations, see G. VERHOEVEN and J. A. MOL, *Friese Testamenten*, p. XIV-XVII.

36 *Ibidem*, p. 485-543.

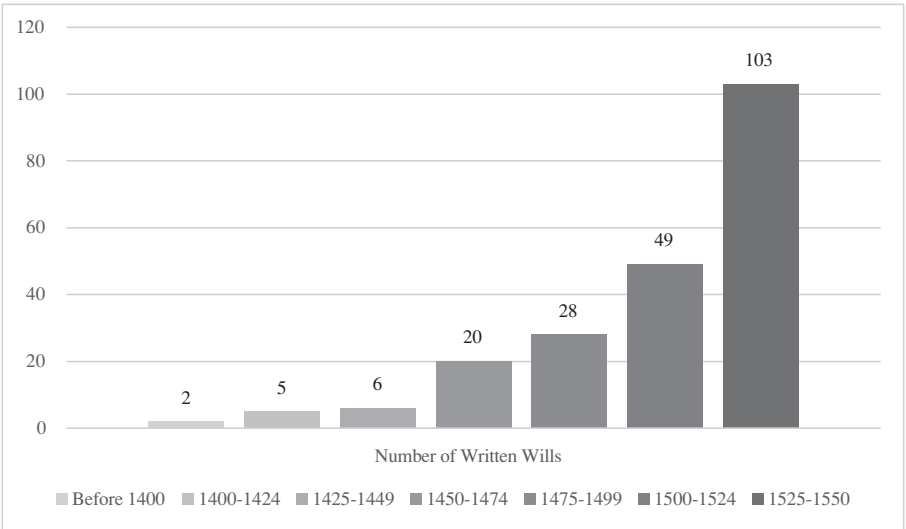

Figure 1: The number of preserved written wills over time, in sections of 25 years. All wills are from Westerlauwers Frisia, except for the two wills from before 1400.

First, a testament according to Roman law excluded intestate succession, which means that a will always took preference over heirs at law.[37] Several formalities were also required for a valid testament according to Roman law, the most crucial being that an heir had to be instituted (*heredis institutio*). Without instituting an heir, a testament was not valid.[38] The primary function of a will was to secure succession. If someone wanted to disinherit or substitute an heir, they had to mention that heir by name. This only pertained to descendants. If the heir at law was not a child or grandchild, they had not to be mentioned in the testament.[39] However, children could not be completely disinherited without a sound reason. They were entitled to their share in a third or half of the inheritance. This so-called legitimate portion (*portio legitima*) also restricted the possibility of bequeathing to the Church and charitable ends.[40] For the institution of an heir, words with clear intention were

37 D. 50,17,7, *Ius nostrum*.

38 Inst. 2,13pr., *Non tamen*. See also M. Kaser, *Das römische Privatrecht: Zweiter Abschnitt*, p. 490 ff; D. Johnston (*ed.*), *The Cambridge Companion to Roman Law*, Cambridge, 2015, p. 202. For the formalities for drawing up a testament according to Roman law, see M. Kaser, *Das römische Privatrecht: Zweiter Abschnitt*, p. 477 ff; T. Rüfner, "Testamentary Formalities in Roman Law", in: K. Reid *et al*. (*ed.*). *Comparative Succession Law: Volume I: Testamentary Formalities*, Oxford, 2011, p. 2-27; and Idem, "Substance of Medieval Roman Law: The Development of Private Law", in: H. Pihlajamäki, M. D. Dubber, and M. Godfrey (*eds.*), *The Oxford Handbook of European Legal History*, Oxford, 2018, p. 320.

39 Inst. 2,13,1, *Nominatim autem* and in D. Johnston, *The Cambridge companion*, p. 202.

40 Nov. 18 and Nov. 115.

required, but no formal arrangement of these words or sentences had to be included.[41]

Furthermore, for a will to be valid, seven witnesses had to be present.[42] A *testamentum* could also be made orally (*per nuncupationem*), in which case seven witnesses had to be present as well.

Secondly, a principal difference between a codicil (*codicillus*) and the testament (*testamentum*) was the number of witnesses, of whom a codicil required only five. Another difference was that a codicil did not contain an institution of an heir, but only *fideicommissa* (requests to the heir or legatee to perform certain acts).[43] A written clause enabled a testament to be treated as a codicil if it was deemed an invalid testament. Such a *Kodizillarklausel* was necessary, because an invalid testament could not be considered a codicil by implication alone.[44] Hotnya likely wrote such a codicillary clause in his testament when he wrote that his will '*shall be valid in all its articles as a testament or as a codicil*'.

Thirdly, Hotnya mentions 'another type of last will' which could refer to a testament drawn up according to canon law instead of according to Roman law. Such wills were made since at least the ninth century in Western Europe and fell under the jurisdiction of ecclesiastical courts, especially when they contained bequests for the Church or charitable institutions. Members of the clergy were usually present for last wills.[45] It is likely that the wills mentioned in the *Book of Emperor Rudolf* and the *Statutes of Opstalsbam* were made according to canon law, and therefore the canon law testamentary tradition preceded the emergence of secular testaments in the fifteenth century.

There are some differences between testaments drawn up according to the Roman rules and those in accordance with the ecclesiastical precepts. Making a canon law will was, first of all, a spiritual undertaking and a religious act. A central part of religious life was to give alms, often at the end of one's life or even on a deathbed. Dying persons were expected to leave part of their property to charitable institutions and the Church. This act was called *donatio pro anima,* the gift for the soul. In this manner, a dying person hoped to gain salvation. The amount of this donation could vary between a modest gift and the entirety of one's property, if the *portio legitima* of the children was observed.[46] That these donations were the

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41 G. MOUSOURAKIS, *Fundamentals of Roman Private Law*. Berlin, Heidelberg, 2012, p. 289; M. KASER, *Das römische Privatrecht: Zweiter Abschnitt*, p. 491 f.

42 C. 6,23,21, *Hac consultissima*. For the Roman testament, see M. KASER, *Das römische Privatrecht: Zweiter Abschnitt*, p. 477-482.

43 Inst. 2,25, *Ante Augusti*. For the codicil, see M. KASER, *Das römische Privatrecht: Zweiter Abschnitt*, p. 495 ff.

44 *Ibidem*, p. 497.

45 J. D. HANNAN, "The Canon Law of Wills", *The Jurist* 4 (1944), p. 528.

46 About the *portio legitima*, see J. HALLEBEEK, "Dispositions *ad pias causas* in Gratian's *Decretum*. Should the *portio Christi* Be Restricted to the Child's Share?", in: R. ZIMMERMANN (*ed.*), *Der Einfluss religiöser Vorstellungen auf die Entwicklung des Erbrechts* [*The Influence of Religious Ideas on the Development of Inheritance Right*], Tübingen, 2012, p. 79-102.

primary purpose of such a will is also apparent in their position within the documents: they were placed right at the beginning, with any distribution of property to family etc. coming afterwards.[47]

As most donations were given to the Church or its own charitable institutions, clergy and ecclesiastical institutions had a strong interest in enabling people to make wills. At the same time, they sought to control how testaments were made. To increase the number of people who donated *pro anima*, the Church wanted to make drawing up a testament easy. The formalities of canon law for a last will were much simpler than those of Roman law.[48] The institution of an heir was no longer required, and only two witnesses were needed for attestation, along with a priest to authenticate the will.[49] This simplicity greatly contributed to its spread.

After the revival of Roman law, requirements for a valid testament were debated among learned jurists. In the twelfth century, pope Alexander III (1100/1105-1181) argued that the stricter formalities of Roman law were not necessary and issued a decree stating that two witnesses and a priest sufficed.[50] However, some canonists argued that two witnesses and a priest were only adequate for charitable disposals, while others argued that they sufficed for all forms of the testament. Moreover, Pope Alexander III asserted that for charitable disposals, no priest needed to be present at all.[51] Different regions came to different conclusions regarding this debate. In England, for example, the simple canon law form prevailed without much discussion.[52]

In summary, there were three possibilities originating in learned law that provided for formalities to make a last will: a testament according to Roman law, a codicil, or a testament according to canon law. Jarich Epa Hotnya hoped that his document could be valid as either one of the three, writing that it should be '*as good as possible according to the laws, whether it be ecclesiastical or secular*'. What, then, did Frisian law say about how a testament should be validly made? This question can be examined under many aspects, including the requirements to be a testator, what had to be included in the testament, how many witnesses had to be present, and who was the official responsible for attesting the will. This contribution focuses only on the number of witnesses required, as this number can tell us something about which formalities were applied and what kind of testaments Frisian testators made.

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47 S. Epstein, *Wills and Wealth*, p. 6 and 136-137.

48 J. D. Hannan, "Canon Law of Wills", p. 535.

49 X. 3,26,10, *Cum esses*. For the formalities of wills and others, see J. D. Hannan, "Canon Law of Wills", p. 534-541.

50 X. 3,26,10, *Cum esses*. J. D. Hannan, "Canon Law of Wills", p. 528.

51 A. Bassani, "A Coffer for the Will" in: M. G. di Renzo Villata (*ed.*), *Succession Law, Practice and Society in Europe across the Centuries*, Cham, 2018, p. 241. Both opinions are present in X. 3,26,11, *Relatum est*.

52 M. M. Sheehan, *The Will in Medieval England. From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, Toronto, 1963, p. 176.

5. The number of witnesses in fifteenth-century law texts

The requirements for the number of witnesses in Roman law (seven) and canon law (two or three) were mutually exclusive. A testament drawn up according to Roman law could not have only three witnesses. By examining the formalities of testaments in Frisia, we can determine which of these two requirements was established in written law.

Neither of the classical Frisian sources nor the *Freeska Landriucht* mentions a specific number of witnesses. As explained earlier, it is likely that the exact formalities existed within canon law and that testaments were made according to it. The first instance concerning the number of witnesses is found in the late fourteenth-century *Rechten ende Wilkoeren*.

> RW 69: 'Van testament tho maken. *Wat so een man doe op syn leste tyt by syn bichtvaders rade tho wthynge ende net tho ynnigen, also vere als de prester dar* ***twe trouwe tuygen*** *by heft, soe ys dee daet schuldych een stall tho holden*.' (Of the making of a testament. Whatever a man does on his deathbed on the advice of his confessor – as long as it concerns donations and not claims[53] – is valid if the priest has two reliable witnesses with him.)

Here is mentioned that two reliable witnesses (*tuygen*/*orkenen*) have to be present beside a priest. This corresponds to the requirements of canon law, which mandated a priest and at least two witnesses. We can conclude that the *Rechten ende Wilkoeren* exclusively reproduce canon law regarding witnesses. Whether this meant that the canon law testament was anchored in secular Frisian law, or that it was merely reproduced, is unclear. However, this text is an indication that the earliest testaments were drawn up according to canon law and that the canonical testamentary tradition preceded the secular one.

a. The Number of Witnesses in the *Excerpta Legum*

In contrast to the *Rechten ende Wilkoeren*, a provision of the fifteenth-century *Excerpta Legum* details that seven witnesses are necessary for making a testament:

> Exc 58: '*Jtem. Dit is riucht, datter iii orkenen nat nochliic sint to barian een testament, mer der herat to wel vii: C. De testament is, I. Si unus, et eciam I. ultima*'.[54] (Item. This is the law that for an attestation of a testament three witnesses are not enough, but that seven are necessary, see [C. 6,23,12, *Si unus*] and [C. 6,23,31, *Et ab antiquis*].)

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53 The exact meaning of *tho wthynge ende net tho ynnigen* is unclear. It is possible that *ynnigen* refers to outstanding debts.

54 *A*, I (*Exc*) 58, in W. J. Buma, et al., *Codex Aysma*, p. 48.

The rejection of the canon law requirement of three witnesses in favour of the seven witnesses needed in Roman law is evident in this provision. It shows that testaments had to be drawn up according to Roman law, at least regarding the number of witnesses.

The two allegations in this provision are to a title in the *Codex* of Justinian that concerns how a testament had to be made ('*De testamentis: quemadmodum testamenta ordinantur*'). The first allegation (C.6,23,12) states that a will with even one of the seven witnesses missing is void: '*Si unus de septem testibus defuerit […], iure deficiat testamentum.*'[55] This highlights that seven witnesses were obligatory and that any smaller number, including three, was insufficient. The second allegation (C. 6,23,31) details exceptions: in a rural area where seven witnesses cannot be found, five are sufficient. However, under no circumstance is less than five allowed: *minus autem nullo modo concedimus*.[56] Thus, these allegations confirm the required number of witnesses and explicitly forbid any lesser number of witnesses than seven (or five in a rural area). This rule excludes the possibility of making a valid, secular testament by following canon legal norms.

To find an answer to the question of whether Frisians could still write testaments with less than seven witnesses, we can examine another provision in the *Excerpta Legum*, where the various forms of testaments are discussed.

> Exc 59: '*Jtem. Dit js gastlijc riucht, dat dia biwysinghe ief dyo biprouinghe van <en> testament machtich ief nochlic is, der en man makat vor syn persona ende vor ij orkennen. Dit is to verstane van guede, der heilgum iefta herum iefta to Godis erum bispritzen is. Dat steet screwen De testibus, Cum a nobis*[57]*, et c. Relatum, in glosa per doctores*[58]*, et De noui operis nunciacione, c. i per Joannem Andree*[59]*. Want oers so scold di paeus des keysers riucht al to lijchtlike weer ropt habba, der nat reedlijc were dat hy dat dwaen scolde, sonderlingha in da logum ief in da stedum, der hem beyda gaestlijc riucht ende wraldisk riucht nat to biherat, als deer steet screwen. Argumentum de hoc De iudicijs, Nouit ille; et c. De appellacionibus, <Si> duobus; et C. De inofficioso testamento, l. Quoniam. Ende dat dy keyser wold, datter vij orkenen vr dat testament scolde wasa, dat is al deer omme, datter inda testament nene falskheit bysighat worda,*

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55 C. 6,23,12.

56 C. 6,23,31,3, *§ Si autem.*

57 The manuscript that Buma *et al.* have worked with has led them to the conclusion that X. 2,20,28 is referenced here. See W. J. Buma *et al*., *Codex Aysma*, p. 48-51. There is mention of two or three witnesses in that provision indeed. However, in context of the next allegation X. 3.26.11, it appears more likely that not X. 2,20,28, *Cum a nobis,* but X. 3,26,10, *Cum esses*, is referenced. The same provision and its allegations reappear in *JF* 46:70 and gloss 90. There, reference is given to X. 3,26,10. Consequently, I believe that there may have been an error of transcription or interpretation. I will therefore not examine X. 2,20,28 any further.

58 Glossa '*relictis*' and '*decretorum*' ad X. 3,26,11.

59 Giovanni d'Andrea. *In quinque decretalium libros novella commentaria*, ad X. 5,32,1.

als dijr steit screwen Jnst., De fideicommissarijs hereditatibus, § vltima'.[60] (Item. This is ecclesiastical law that the proof or confirmation that someone has drawn up a last will in the presence of his priest and two witnesses is valid and sufficient. That must be understood in such a way that it concerns property that is left to saints and lords (church and clergymen) or in the honour of God. This is written by the scholars in [X. 2,20,28, *Cum a nobis*] and [X. 3,26,11, *Relatum est*], in the glosses '*relictis*' and '*decretorum*', and by Giovanni d'Andrea in his commentary to [X. 5,32,1, *Intelleximus*]. Because otherwise the pope would revoke imperial law all too lightly, which would not be correct that he would do so and in particular in those places and locations where he has no control over both ecclesiastical and secular law. The argument for this is in [X. 2,1,13, *Novit ille*], [X. 2,28,7, *Si duobus*] and [C. 3,28,32, *Quoniam*]. And that the emperor wanted seven witnesses to be present when drawing up a last will, so that there would be no forgery in a last will, is written in [Inst. 2,23,12, *Et quia*].)

It appears that wills made according to canon law could still exist, albeit for limited purposes. They were restricted to ecclesiastical matters, '*heilgum iefta herum iefta to Godis erum bispritzen*'. This provision creates two forms of testament: secular wills that require seven witnesses and ecclesiastical wills that require only two witnesses but are limited to pious bequests. The Church retained jurisdiction over the latter, as it had during previous centuries.[61] The first line of the text, '*Dit js gastlijc riucht*' ('This is ecclesiastical law'), clarifies that what follows – a priest and two witnesses – constitutes ecclesiastical rather than secular law. Wills that concerned anything other than pious bequests should fall under secular jurisdiction and follow secular, Roman law.

The two glosses on '*relictis*' and '*decretorum*' mentioned in the context of X. 3,26,11 confirm unequivocally that two or three witnesses are sufficient only for charitable wills: '*Ad hunc casum restringe cap. proxi. s. eo. in quo favore ecclesiae sufficiunt duo vel tres testes*'.[62] and '*Sic nota causas ultimae voluntatis defunctorum ad ecclesiasticum iudicem pertinere, quod verum est in relictis ecclesiae, et pauperibus*'.[63] The same is supposedly said by Giovanni d'Andrea (c. 1270-1348) in his commentary to X. 5,32,1. However, no such argument is found there. It is probable that this allegation was corrupted. Alternatively, Giovanni d'Andrea makes

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60 *A*, I (*Exc*) 59, in W. J. BUMA *et al*., *Codex Aysma*, p. 48-50.

61 U. SEIF, "Römisch-kanonisches Erbrecht in mittelalterlichen deutschen Rechtsaufzeichnungen" ["Romano-Canonical Inheritance Law in Medieval German Legal Records"], *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Germanistische Abteilung* [*Journal of the Savigny Foundation for Legal History: Germanistic Section*] 122 (2005), p. 101.

62 Glossa '*relictis*' ad X. 3,26,11.

63 Glossa '*decretorum*' ad X. 3,26,11.

a similar argument in a commentary to X. 3,26,11: '*Valet legatum ad pias causas coram duobus testibus factum.*'[64]

In the provision above (*Exc* 59), the opinion of those canonists who believed that the canon law formalities for a testament only applied for charitable purposes is presented. Therefore, any testament that was not entirely dedicated to the Church required seven witnesses, as stated in the provision. The reason provided for this is that the pope would not want to revoke imperial law, especially in regions under secular jurisdiction. Three references are presented to support this argument.

The first reference (X. 2,1,13) explains that the Church is only concerned with spiritual law, not secular law. This comes from a letter of Innocent III (1161-1216) to French prelates regarding a dispute between the kings of England and France. Innocent III writes that while he has no jurisdiction over secular matters, his ecclesiastical competence extends to cases where someone committed a sin. Although this reference is not directly relevant to testaments in Frisia, it demonstrates the porous borders between secular and ecclesiastical jurisdiction.[65] The second reference (X. 2,28,7) concerns an appellation from a secular judge. One cannot appeal a decision by a secular judge to the pope unless the pope has secular jurisdiction in that region. This reference also primarily serves to demonstrate the limits of ecclesiastical competence. The third reference (C. 3,28,32) is unclear and does not seem to provide a suitable explanation. In another version of the provision (*Exc* 59) in the *Jurisprudentia Frisica* (gloss 91 to *JF* 46), the reference is to C. 3,28,35. This reference concerns the legal and ordinary right to make a last will granted by the emperor. The two decretals show the limits of ecclesiastical competence, while the reference to Roman law explains the interest of the emperor in last wills and testaments. This was an argument for why secular law could not simply be disregarded by the Church.

In conclusion, this provision limits canon law wills to charitable purposes only, which fell under ecclesiastical jurisdiction. For all other testamentary dispositions, Roman law (secular law) had to be followed. The same argument was previously made in the glosses '*relictis*' and '*decretorum*' to X. 3,26,11 in opposition to pope Alexander III's decretal. However, it is unclear how this would work in a will that included both the disposition of the estate and charitable donations. Presumably, such a will had to be made according to Roman law.

Interestingly, two consequent provisions in the *Excerpta Legum* state that two witnesses were sufficient, thus contrasting with the provision above:

> Exc 60: '*Jtem. Dit js riucht, dat ij orkenen iefta iij mogen ful wird hoda. Quia in ore duorum uel trium stat omne verbum uel testimonium in c.*

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64 Giovanni d'Andrea. *In tertium decretalium libros novella commentaria*, ad X. 3.26.11, *Relatum est*, n. 1.

65 Alternatively, not respecting the will of the testator can be considered a sin, and therefore could fall under competence of the Church. The Church claimed competent in cases of sin, as by the 'reason of sin' (*ratione peccati*). X. 2,1,13, *Novit ille*.

> *Relatum, De testamentis, et Jhoannis viij*'.[66] (Item. This is the law, that two or three witnesses are able to fully attest to the truth. 'Because in the mouth of two or three people all words and testimonies persist.' [X. 3,26,11, *Relatum est*] and [John 8,17]).
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> Exc 61: '*Jtem. Dit js riucht, dat ij orkenen steet to lewan. Dat steit screwen aldus in sacra scriptura ut Matthei xviij et Deuteronomio xix et in lege Moysayca. Jn iure canonico expresse cauetur et in c. Cum esses, De testamentis; et c. Licet vniuersis (X. 2,20,23); et in c. In omni negocio, De testibus, jn quibus iuribus scriptum est expresse: Jn ore duorum etcetera*'.[67] (Item. This is the law that two witnesses are to be believed. That is written in Holy Scripture in [Math. 18,16] and [Deut. 19,15] and in the law of Moses. In canon law this is expressly said in [X. 3,26,10, *Cum esses*], [X. 2,20,23, *Licet universis*] and [X. 2,20,4, *In omni negotio*], where it is expressly written: In the mouth of two etc.).

The contrast to the previous provisions may be explained in two ways. First, there was no certainty or decision of the compilers of the *Excerpta Legum* regarding the number of witnesses. They collected case records that argued for opposite points. The intention was to decide on the number of witnesses when the collection was transformed into a law text. The second possibility is that these two contrasting examples (*Exc* 60 and 61) do not refer specifically to testaments but to testimonies in general. It is possible that in the case of attestation of a testament, seven witnesses were required, while in other cases, two or three sufficed. Neither of the two provisions mentions a last will and testament. However, they follow immediately after the previous provision (*Exc* 59), which concerns witnesses for making wills. Moreover, reference is provided to both X. 3,26,10 and 11, which we have previously discussed. These references declared that two or three witnesses were sufficient for canon law wills.

Additionally, a new argument is brought up in another provision.

> Exc 88: '*Jtem. Dil js riucht, datma vij orkenen bet lewa scel danma breef ende sygel van twam of van iij. Dat steil screwen: Quia viua vox pocior est quam mortua, de probacionibus, tercio loco*'.[68] (Item. This is the law that seven witnesses are more to be believed than a document sealed by two or three. This is written: because the living voice is mightier than the deceased, see [X. 2,19,5, *Tertio loco*].)

It is possible that testaments could be made with only two or three witnesses present, but it is more likely that this provision (*Exc* 88) is dealing with witnesses in the context of providing evidence in litigation. Theoretically, it is possible for

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66 *A*, I (*Exc*) 60, in W. J. Buma *et al*., *Codex Aysma*, p. 50.
67 *A*, I (*Exc*) 61, in *Ibidem*, p. 50.
68 *A*, I (*Exc*) 88, in *Ibidem*, p. 68.

testaments made according to both Roman and canon formalities to exist and be valid at the same time. However, the contradictions and possibilities within the collected texts explain why Frisian testators were not entirely certain about what was required of them to make a valid testament.

b. The number of witnesses in the *Jurisprudentia Frisica*

The compilation *Excerpta Legum* was reworked into a structured law text at the end of the fifteenth century, called the *Jurisprudentia Frisica*. It consists of eighty-seven titles concerning various topics from procedural law to criminal law.[69] In the title *de testamentis* (*JF* 46) we find in the very first provision that seven witnesses are prescribed.

> *JF* 46:1: '*Dit is riucht dat to een noeglyck testament schellet wesse sawn orkenen dyr aldeer to baeden sint Ende ist een leya testament deerma alzo manich l nae krya moge So ist a noegh oen fyff orkenen. Ende om dissen willa dat disse seeck in dat wralsche riucht is so meyma naet myn habba dan sawn off fyff orkenen*'.[70] (This is law, that seven witnesses who have been called there must be present when a last will is drawn up. And if it is a layperson's last will, for which one is not able to procure so many witnesses, then five witnesses suffice. And because these cases are dealt with in a worldly court, one is not allowed to have less than seven or five witnesses).

It is noteworthy that this provision places the making of a testament under the jurisdiction of a secular court. This indicates that Frisian secular law not only had competence regarding testaments but also followed the requirements of Roman law in terms of the number of witnesses. This includes an exception: five witnesses are sufficient when there are not enough people present, such as in sparsely populated areas.[71] Additionally, other provisions in the *Jurisprudentia Frisica* (46:25, 46:43, 46:45, 46:69, and 46:70) mention the requirement of seven witnesses according to Roman formalities.

However, if this provision concerns the secular court, was it still possible to make ecclesiastical testaments that required two or three witnesses? There are indeed parallel or contradictory rules, like in the *Excerpta Legum*:

> *JF* 46:44: '*Jtem Een prester mit twam orkenen moghen een testament machtich hoda*'. (Item. A priest and two witnesses can confirm the validity of a last will).

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69 Gerbenzon has produced a detailed analysis of the text in two articles: GERBENZON, "Aantekeningen over de 'Jurisprudentia Frisica' (Eerste Deel)". IDEM, "Aantekeningen over de 'Jurisprudentia Frisica' (Tweede Deel)".

70 *Ro*, III (*JF*), tit. 46, nr. 1.

71 See for this also C. 6,23,31, *Et ab antiquis*.

> Glossa 65: '*Item Een prester ut in c. Cum esses titulo de testamentis. Et duo testes sine presbitero sufficiunt ad pias causas, de testamentis c. Relatum*'.[72] (Gloss 65. 'Item een prester' as in [X. 3,26,10, *Cum esses*]. And two witnesses without a priest suffice for charitable ends, see [X. 3,26,11, *Relatum est*]).

This provision contains rules of canon law, and it contradicts the previous provision. It also references the two decretals by pope Alexander III recorded in the *Liber Extra* (X. 3,26,10 and 11), which imply that two or three witnesses were sufficient for a testament. The gloss in this text states that two witnesses are enough for charitable ends, and thus two witnesses and a priest should be sufficient for all other testaments, including ones not for charitable ends. It is unclear whether this refers to secular wills or only to ecclesiastical wills.

A second provision (*JF* 46:70 and gloss 90) also mentions the canon law requirements, but this provision was already present in the *Excerpta Legum* (*Exc* 59). It states that two or three witnesses are enough for testaments for charitable ends, but seven witnesses are needed for other testaments. Therefore, it is clear that this line of thought continued into the *Jurisprudentia Frisica*. This is also once again detailed in another gloss (gloss 66 to *JF* 46:45). The main text mentions a priest and a notary, which is another interesting aspect of Frisian testaments which requires more research.

> *JF* 46:45: '*En testament fan wralsche secken ende aeck fen lawen ende eerffscip deer sint netrefftich sawn orkenen toda prester jeffta keysers orkenen deer al deer al jowns to ropen wirdeth Ende middelste dat sint vijff dat is in een huusmans testament. ende in een litika gae deer naet fule folkes wrgaria mey*'. (For a last will concerning worldly affairs and also of legacies and inheritance, seven witnesses are needed alongside the priest or notary who are called up at the same time, and on average five, that is in a farmer's last will and in a small parish where not many people can gather.)
>
> Glossa 66: '[…] *Item et quod dicitur de testamentis et ultimis uoluntatibus in c. Cum esses et c. Relatum, intelligitur tantum de relictis ad pias causas uel ad pias usus, ut dicunt doctores, quia non est uerisimile quod dominus papa unico uerbo tot legibus derogare, arg. ad hoc C. de inofficioso testamento l. Si quinque, ne falsitas in testamento committerentur, uoluerant ut talis certus numerus adhiberetur, C. de fidei commissis l. ultima*'.[73] ([…] Similarly, what is stated about testaments and last wills in [X. 3,26,10, *Cum esses*] and [X. 3,26,11, *Relatum est*], is understood as concerning only things left to charitable ends or for charitable use, as the scholars say, because it is not very likely that the pope with one single word derogates

[72] *Ro*, III (*JF*), tit. 46, nr. 44.
[73] *Ro*, III (*JF*), tit. 46, nr. 45.

from so many provisions, see [C. 6,28,35, *Si quinque*]. They wanted that such a distinct number is called upon, so that in the last will no fraud is committed, see [C. 6,42,32, *Quaestionem*]).

It is stated here that the decrees of Alexander III only pertain to charitable dispositions and not secular ones, as in the provision (*JF* 46:45) itself. It appears, therefore, that when making a testament that does not exclusively contains pious bequests, Roman rules were applied. When speaking of a testament made with two or three witnesses according to canon law, it was therefore a testament for charitable ends falling under the competence of an ecclesiastical court. Jurists may have had personal motivations for including a simple way for people to leave property to the Church and its institutions in the compilations of law texts. Some of them were clerics themselves, who had studied learned law at universities in Europe and worked at monasteries in Frisia. Therefore, they were some of the principal beneficiaries of charity to ecclesiastical institutions.

However, it remains puzzling why *JF* 46:44 states that a priest and two witnesses can validate a will when it appears that this number of witnesses was only valid for charitable ends, as *JF* 46:70 and gloss 66 to *JF* 46:45 claim. No mention is made in *JF* 46:44 of a restriction for charitable ends. Indeed, charitable ends require only two witnesses and no priest present.[74] A potential answer is found in another provision. *JF* 46:25 concerns the last-made will:

> '*Jof een man een testament maketh haet ende dyr sawn fol orkenen wr wessen habbet, ende hy dan deer ney dat foerlibbe fyff of sex of tyen jeer langera of kortera, ende sterue, dan so schel dat testament staen ende een folle macht habbe. Ende ist seeck datter een oer testament maketh eer hy dan sterfft so schel dat machtich blywe dyr lest mecket is ende dat arst naet. Ende al heder al sawn orkenen wr dat arste testament wessen dat scholde allycual onmachtich blywe, ende dat lest schel staen, al weer deer naet meer dan twyr orkenen wr wessen. Ende sinter sawn wr dat leste so ist alzo fule festera ney riucht*'.[75] (If a person has made a last will and seven true witnesses were present, and after that he would live for five or six or ten years, longer or shorter, and then would die, then the last will will be valid and fully legal. And if he makes another last will before he dies, then the testament that was made last and not the first will have legal validity. And even if there had been seven witnesses to (making) the first testament, that would nevertheless no longer have any legal validity and the latter will be valid, even though there would have been no more than two witnesses. And if seven were present at the latter, then that is all the more powerful by law).

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74 As we have seen in gloss 65 to *JF* 46:44.

75 *Ro*, III (*JF*), tit. 46, nr. 25.

As with previous provisions, seven witnesses are stated to be required. A will that was made chronologically last always invalidated all previous wills. This provision also includes a notable exception: even if the last will was only attested by two witnesses, it is still considered valid and supersedes all previous wills. This contrasts with other parts of the title that state that less than seven witnesses invalidate a will (*JF* 46:1).

One possible explanation for this exception is that a will represents the final wishes of a dying or deceased person, and those intentions are to be protected.[76] In this case, ensuring that the last will persists, even if it does not meet the usual formal requirements, may be seen as a way of honouring the testator's wishes. However, the provision also notes that a testament with seven witnesses is still considered stronger.

Another possibility is that the first will was a secular one and had the required seven witnesses present. The second will, however, was ecclesiastical and left all the testator's assets to the Church or other charitable ends, and therefore only two witnesses were needed. In this scenario, the second will would overrule the first will, even if it was made according to different formalities.

In conclusion, both the *Excerpta Legum* and the *Jurisprudentia Frisica* establish that seven witnesses are required for the creation of a secular testament, indicating that Roman law was received and applied. However, even in the late fifteenth century, the *Jurisprudentia Frisica* mentions two or three witnesses, which may have been limited to dispositions and wills for the Church and charitable ends, or to replace a previous will with seven witnesses. As a result, secular testaments were made according to secular Roman law.

While the number of witnesses and references to Roman law indicate a secularization of testaments, it is important to note that testaments with the Church as beneficiary could still be validly drawn up according to canon law, and disputes concerning these testaments fell under the jurisdiction of the ecclesiastical court.

JF 46:44 may have applied exclusively to this category of testaments, but this is unclear because the gloss (gloss 65) mentions wills for charitable ends requiring only two witnesses and no priest. As a result, it is possible that *JF* 46:44 allows any last will to be drawn up according to canon law, including secular wills, which would contradict earlier rules that required seven witnesses (*JF* 46:1). For this reason, the *Jurisprudentia Frisica* remains ambiguous on this issue.

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76 A. Bassani, "A Coffer for the Will", p. 231 f.

6. The number of witnesses to Hotnya's last will

Returning to the testament of Jarich Epa Hotnya, we can consider how many witnesses there were to his will. It is clear that Hotnya was not sure what form a valid will had to take, so he included a clause for it to be a codicil or any other last will. The document itself was written down by someone other than Hotnya, who mentions himself and the other witnesses at the end.

> '*In een tyoch der weerheyts ende disses testaments jefta lesta willa soe hab ick, her Gelmer, persenna uppa Nyaland* [Nijland] *ende testamentoer Jarichs voors., disse lesta willa mey myn selwis sighel besigheleth. Ende um mara festicheyt soe habbet wy, her Johannes ende heer Hydda, joncrapresteren uppa Nyaland, dit mey bisygheleth om Jarichs voors. beda willa. Ende is het originael testament van dese copie gesn in papier, ende onder opt spatium myt drye segelen van groenen wasse besegelt, ende buyten opten rugge state gesn: Dit is Jarichs testament*'.[77] (As testimony of the truth and of this testament or last will, I, Gelmer, priest in Nijland and writer of the testament of the afore-mentioned Jarich, have sealed this last will with my own seal. And so that (the testimony) is firmer, we, Johannes and Hydda, chaplains in Nijland, have also sealed this at the request of the afore-mentioned Jarich. And the original testament of this copy was written on paper, and three seals in green wax were set in the space for the seals, and on the back is written: This is Jarich's testament.)

Apparently, the will of Jarich Epa Hotnya was witnessed and sealed by three witnesses. Note that these three were all clerics: a priest named Gelmer and two chaplains named Johannes and Hydda. The fact that three witnesses were present (a priest and two others), and that all witnesses were clerics, shows that this testament was made according to canon law regarding the number of witnesses. According to Roman law, neither a testament nor a codicil could have only three witnesses.

This circumstance explains why Hotnya wanted his will 'to be valid in all its articles as a testament or as a codicil or as any other kind of last will'. He had written a will that was witnessed by only three witnesses. He was therefore unsure whether his will was valid and hoped that by including such a clause it would be considered valid in any form. According to fifteenth-century Frisian law, his will would not have been valid because it lacked seven witnesses. At the same time, it is clear that Hotnya believed that it could be valid despite this, suggesting that while seven witnesses were preferred, wills with fewer than seven were still permissible.

Moreover, the appearance of such a clause in Hotnya's will indicates that he did not believe that making a will in accordance with canon law was sufficient. If

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77 G. Verhoeven and J. A. Mol, *Friese Testamenten*, p. 60, r. 32-40.

he had believed that, there would have been no need to include such a clause. His will would simply have been valid with three witnesses. However, Hotnya did include such a clause, and consequently hoped that his will could be valid as any form of will.

7. Conclusion

In conclusion, Frisian legal texts of the fifteenth century show that seven witnesses were preferred to two or three. In general, the recorded legal texts reflect legal practice, as there was no central authority to impose formalities on wills. Therefore, it is clear that the Frisian sources considered Roman law to be a better framework for drawing up a will. From the fifteenth century at the latest, Frisians began to consider Roman law applicable to testaments.

However, in practice, it was still permissible to draw up a will according to canon law, as the will of Jarich Epa Hotnya shows. Hotnya made a will with only three witnesses, and while he was unsure about the validity of this will and therefore included a clause at the end, this did not prevent him from making a will with fewer than seven witnesses. This uncertainty about the correct number of witnesses is also reflected by the instances in the *Excerpta Legum* and *Jurisprudentia Frisica* mentioning two or three witnesses as sufficient.

Frisians drawing up wills with less than seven witnesses still wanted them to be valid. Written law seems to have allowed this, even when it contradicted the preferred Roman law. The testator's intentions had to be respected, and so practicality could override the formalities of written law. It may have been more important to allow a testator to distribute their property freely than to adhere to the correct laws.

Further research can be done on Frisian wills, particularly on the institution of an heir, other requirements for being a testator, and who had to be present to witness a will. This article has shown that there was still considerable uncertainty as to how a will was to be drawn up. The clause written by Jarich Epa Hotnya in his own will is evidence of this. In the end, 'as good as possible according to the laws' did not mean perfection, but the bare minimum for a will to be valid.

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DIFFERENTIAE ON *QUARTA TREBELLIANICA*: LEGAL PRACTICE AND THE SCHOLARLY DISCOURSE OF *IUS COMMUNE*[*]

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Abstract – The late medieval and early modern *differentiae iuris civilis et canonici* addressed various discrepancies between civil and canon law concerning testamentary succession. Among the most discussed issues was the question of the quantity of the share to which the heir burdened with a *fideicommissum hereditatis* was entitled (legitim, *quarta Trebellianica* or both of them). While most *differentiae* did not employ practice-oriented literature to address this question, two early modern examples of *differentiae* by Johann Emerich von Rosbach and Konrad Rittershausen referred broadly to legal practice insofar as it was cited in legal scholarship. Close scrutiny of the role of these references in the structure and reasoning of these two German authors revealed that the pragmatic literature was of limited relevance to the scholarly discourse of *differentiae*. The examined passages from *differentiae* written by these two protagonists of legal humanism show that practice-oriented literature did not help to provide new arguments or challenge some doctrinal concepts of *ius commune*, but instead had served a subsidiary role in providing the examples of the past and contemporary application of legal provisions or in illustrating some subtleties of the doctrinal discourse.

1. Introduction

In the early modern period canon law and civil law were not unanimous as to all aspects of testamentary succession. Some of the discrepancies between the two laws were of great relevance, while others were just minor issues. The works labelled as *differentiae iuris civilis et canonici* (hereafter: *differentiae*) listed these differences. This genre had been developed in the late Middle Ages to cover the points of

* The working catalogue of the early modern *differentiae iuris civilis et canonici* is available for use and open for comments here: www.bit.ly/differentiaeiuris.

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contention between the two laws. While the authors of the late medieval works only occasionally provided sophisticated discussions on various differences and seldomly referred to other scholarly works, in the early modern period, when legal science witnessed a methodological shift, many works from the *differentiae* genre became highly nuanced academic treatises. The objective of this paper is to determine the relevance of local legal customs and practice for *differentiae* dealing with testamentary succession. There were a couple of standard points of contention on this matter within this subject, such as the number of witnesses required for making a will or the remedies available for the legatee. Civil law and canon law disagreed also on the quantity of the share to which the heir burdened with a *fideicommissum* was entitled, namely whether it should be either a legitim or *quarta Trebellianica*[1] or – under some conditions – both of these. The legitim (*pars legitima*) was 'the share of an inheritance due to an heir who would succeed under the law of intestacy'. This term is usually used to describe the fourth part of the heir's share to which he was entitled in case the testamentary succession occurred. A Trebellianican fourth (*quarta Trebellianica*) was the quarter of an inheritance which was granted to the heir whose share was burdened with *fideicommissa*.[2] I will focus only on this one difference: the portion of the estate which was secured for the encumbered heir, as it was one of the most often described differences, and one of the more sophisticated.[3] This made it potentially more open to the development of new arguments and reasonings.

The timeframe for the sources selection is ca. 1350-1620. For the Middle Ages the *differentiae* contained in *Tractatus Universi Iuris* will be used as the model works and to them there will be added *differentiae* misattributed to Bartolus de Saxoferrato (1314-1357). For the early modern period the most relevant sources will be the *Tractatus de comparatione iuris civilis et canonici* by Johann Emerich von Rosbach (1551-1605) and *Differentiarum iuris civilis et canonici seu pontificii libri septem* by Konrad Rittershausen (1560-1613). These two works will be supplemented with brief remarks on other examples of *differentiae* published between 1500 and 1620, *i.e*. twelve other *differentiae*.[4] The paper will show the argumentative resources used by the learned scholars in all these works, whereby special attention will be paid to the relevance of local legal customs and practice. As the indicators for measuring this relevance the study will focus on the references to the legal literature dedicated to legal practice: *consilia*, *observationes*, *sententiae* and *decisiones*. These works will be examined as argumentative resources within

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1 *Vocabularium iuris utriusque*, Lyon, 1585, s.v. *quartae*, fol. 548. Cf. "Trebellianica", in: L. Favre (*ed*.), *Glossarium mediae et infimae latinitatis conditum a Carolo du Fresne domino du Cange*, Niort, 1887, vol. 8, col. 161c; U. Manthe, *Das senatus consultum Pegasianum* [*The Senatus Consultum Pegasianum*], Berlin, 2021, p. 78.

2 A. Berger, *Encyclopedic Dictionary of Roman Law*, Philadelphia, 1953, s.v. *pars legitima*, p. 618-619; s.v. *quarta Trebelliana*, p. 664.

3 Cf. S. Rigaudeau, *Le testament en droit canonique du XII^e^ au XV^e^ siècle* [*The Last Will in Canon Law from the 12^th^ to the 15^th^ Centuries*] [Thèses, 208], Paris, 2021, p. 253-271.

4 See the 'working catalogue' mentioned above in the first unnumbered note.

differentiae on the *quarta Trebellianica*. The investigation of the potential influence of local customs and practice on *differentiae* may show whether this influence was strong enough to impact the *ius commune*.[5]

There were several early modern genres of practice-oriented legal literature and it seems reasonable to outline briefly the characteristics of the four most relevant ones for the purpose of this paper. *Consilia* were consultations given by legal experts, either to the parties to the dispute or to the judge, in which the author presented the arguments in favour of one solution.[6] *Observationes* were learned treatises focusing on the judicial practice of selected high courts and framing it against the general legal background,[7] while *sententiae* were condensed collections of established doctrines as applied in particular tribunals. *Decisiones* were collections of opinions by judges or other court officials which preceded the final judgement.[8] These descriptions are by no means definitions, as there was no terminological consistency among various authors from various times and places, but they seem appropriate for describing the works mentioned below to which authors of *differentiae* referred.

2. *Differentiae* on the *quarta Trebellianica*

a. Late medieval *differentiae*

In the works from the late Middle Ages we can find listed *differentiae* related to testamentary succession and among them the question of the relation between the legitim and the *quarta Trebellianica*, that is, the portion of the estate which should remain with the heir in case the bequests almost completely burdened the heir's share.[9] It was very briefly addressed by Galvano da Bologna (ca. 1335-ca. 1395).

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5 One should not expect that the relevance of local legal customs and practice for *differentiae iuris civils et canonici* would be crucial. These *differentiae* were clearly centred on the tensions between the two body of laws and not on the comparison between *ius commune* and local laws. There were, however, many works dedicated to the comparison of civil law with local laws, but these works fall outside the scope of this paper.

6 A. Padoa-Schioppa, "Note sui consilia nell'evoluzione dello ius commune" ["Notes on Consilia in the Evolution of the Ius Commune"], in: M. Charageat (*ed.*), *Conseiller les juges au Moyen Âge* [*Advising Judges in the Middle Ages*], Toulouse, 2014, p. 15-23; W. Druwé, *Loans and Credit in Consilia and Decisiones in the Low Countries (c. 1500-1680)* [Legal History Library, 33], Leiden, 2020, p. 33-52.

7 G. Pomata, "Observation Rising: Birth of an Epistemic Genre, 1500-1650", in: L. Daston and E. Lunbeck (*eds.*), *Histories of Scientific Observation*, Chicago, 2011, p. 52.

8 W. Druwé, *Loans and Credit*, p. 52-76.

9 On the late medieval *differentiae*, see J. Portemer, *Recherches sur les Differentiae juris civilis et canonici au temps du droit classique de l'Église* [*Studies on the Differentiae juris civilis et canonici in the Time of Classical Church Law*], Paris, 1946; N. Horn, "Die legistische Literatur der Kommentatoren und der Ausbreitung des gelehrten Rechts" ["The Legistic Literature of the Commentators and the Spread of Learned Law"], in: H. Coing (*ed.*), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte* [*Manual of the Sources and Literature of the newer*

He wrote that according to Roman law, the heir of the estate charged with legacies was entitled to keep only the Falcidian fourth of the estate, while according to canon law he was entitled to keep two fourths: the Trebellianican fourth and another fourth on the basis of natural law. The canon law approach was justified by the reference to c. *Raynutius* (X. 3.26.16) with the Gloss.[10] Galvano merely defined the point of contention between the two laws and did not seek for any reconciliation between Roman and canon law.

Prosdocimo Conti (1370-1438) also addressed the discrepancy with regard to the share in the estate which was excluded from the burden of bequests. He described the nature of this difference, but he added references to many more sources from civil law as well as to other authors. He mentioned not only the Gloss of Accursius but also the commentary of Baldus de Ubaldis (ca. 1327-1400). The canon law approach was different due to its *benignitas*, and it was allowed for the heir in the case of the restitution of the estate *sub conditione* to keep two fourths of the estate.[11]

Battista da Sambiagio (ca. 1425-1482) also addressed the same issue. In the discussion over the *quarta Trebellianica* Battista's account was very brief. He did not add references to the literature and mentioned only the most relevant sources. However, at the end of his account he added that according to the learned authors it was the canon law approach that should prevail also in civil law.[12] This opinion was not expressly stated by Galvano, nor by Prosdocimo.

History of European private law], vol. 1: *Mittelalter (1100-1500). Die gelehrten Rechte und die Gesetzgebung* [*Middle Ages (1100-1500). Learned law and legislation*], Munich 1973, p. 345-347, 361; M. Ascheri, "Differentiae inter ius canonicum et ius civile", in: O. Condorelli, F. Roumy, M. Schmoeckel (*eds.*), *Der Einfluss der Kanonistik auf die europäische Rechtskultur*, vol. 1: *Zivil- und Zivilprozessrecht* [*The Influence of Canon Law on European Legal Culture. Civil and Civil Procedural Law*], Cologne, 2009, p. 67-73.

10 Galvano da Bologna, "De differentiis legum et canonum", in: *Tractatus universi iuris*, vol. 1, Venice, 1584, num. 9, fol. 189rb: '*Secundum leges filius retinet tantum unam falcidiam secundum canones retinet duas, scilicet debitam iure naturae et Trebellianicam* (…)'.

11 Prosdocimo Conti, "De differentiis inter ius canonicum et ius civile", in: *Tractatus universi iuris*, vol. 1, Venice, 1584, num. 153, fol. 197rb: '*De iure civili filius gravatus pure restituere haereditatem tantum unicam quartam retinet (…) vel dic etiam iure naturae etc. (…) quandocunque eam capiat filius ex testamento patris, vel tempore aliquo de bonis patris imputare tenetur in debitam iure naturae (…). Unde et si eligat Trebellianicam, iam se excludit debita iure naturae, sicut in aliis bonis et filius eam eligendo capit eam ex institutione (…). Hodie autem illa quarta debita iure naturae quanta sit (…). De iure canonico et eius benignitate aliter statuitur in casu praedicto: quia filius gravatus haereditatem restituere non distincto pure, vel sub conditione, retinet duas quartas, unam debitam iure naturae, aliam debitam iure institutionis (…) et ita duae quartae possunt deduci etc.*'.

12 Battista da Sambiagio, "Tractatus insignis et rarus contradictionum iuris canonici cum iure civili nominatissimi doctoris", in: *Tractatus universi iuris*, vol. 1, Venice, 1584, num. 58, fol. 186rb: '*De iure canonico, descendens gravatus per fideicommissum, quando ei debetur legitima, detrahit duas quartas, si est gravatus post mortem suam restituere (…). Secus videtur esse rigore iuris civilis (…). Et ibi per doctores licet opinio canonistarum de consuetudine servetur etiam per legistas: ut ibi notant doctores*'. Interestingly, Portemer labelled this *differentia* addressed by Battista as '*montant de la légitime du grevé de restitution*'. The differences discussed above addressed by Galvano and Prosdocimo,

I did not manage to find this subject in one of the oldest collections of *differentiae* misattributed to Bartolus[13] nor in the latest fifteenth-century *differentiae* by Gerolamo Zanettini (d. 1493),[14] despite the fact that these two sources did mention several topics related to last wills. For the late medieval sources we can say that testamentary *differentiae* were treated similarly; they were founded on references to the sources and provided a summary of the scholarly consensus on the issue. They were not focused on listing the arguments pro and contra particular solutions, nor were they dedicated to describing in detail the doctrinal nuances of every single discrepancy between the two laws. What is particularly relevant for the purpose of this paper is that the late medieval works did not make use of local legal customs and practices, in particular they did not use practice-oriented literature in their legal reasoning.

b. Early modern *differentiae* in general

The early modern works were heterogenous and differed in shape, length, and the author's philosophical and religious views, but they shared the comparative core, namely the comparison of the differing solutions of canon law and civil law.[15] I will

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as well as the ones according to Jacobus de Albertino and the manuscript from Munich were labelled separately as '*montant de la légitime*', see. J. PORTEMER, *Recherches*, p. 140.

13 J. PORTEMER, *Recherches*, p. 70-78; IDEM, "Bartole et les différences entre le droit Romain et le droit canonique" ["Bartolus and the Differences between Roman Law and Canon Law"], in: *Bartolo da Sassoferrato, studi e documenti per il VI centenario* [*Bartolus of Saxoferrato, Studies and Documents for the 6th Centenary*], vol. 2, Milano, 1962, p. 399-412. PSEUDO-BARTOLUS DE SAXOFERRATO, "Tractatus de differentia inter ius canonicum et civile", in: IDEM, *Consilia, quaestiones, tractatus*, Venice, 1590, fol. 146vb-151ra.

14 GEROLAMO ZANETTINI, "De differentiis inter ius canonicum et civile", in: *Tractatus universi iuris*, vol. 1, Venice, 1584, fol. 197vb-208va. Also Portemer did not add any *differentia* from Pseudo-Bartolus and Zanettini to the headings described above in n. 12, see J. PORTEMER, *Recherches*, p. 140.

15 On the early modern *differentiae*, see O. STOBBE, *Geschichte der deutschen Rechtsquellen* [*History of the German Sources of Law*], vol. 2, Braunschweig, 1864, p. 155-157; A. SÖLLNER, "Zu den Literaturtypen des deutschen usus modernus" ["On the Types of Literature of the German Usus Modernus"], *Ius Commune* 2 (1969), p. 185-186; L. PROSDOCIMI, "Il diritto canonico di fronte al diritto secolare nell'Europa dei secoli XVI-XVIII" ["Canon Law versus Secular Law in 16th-18th Century Europe"], in: B. PARADISI (*ed.*), *La formazione storica del diritto moderno in Europa: Atti del terzo Congresso Internazionale della Società Italiana di Storia del Diritto* [*The Historical Formation of Modern Law in Europe. Acts of the Third International Congress of the Italian Society for Legal History*], vol. 2. Firenze, 1977, p. 433-436; A. SÖLLNER, "Die Literatur zum gemeinen und partikularen Recht in Deutschland, Österreich, den Niederlanden und der Schweiz" ["The Literature on Common and Particular Law in Germany, Austria, the Low Countries and Switzerland"], in: H. COING (*ed.*), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, vol. 2: *Neuere Zeit (1500-1800). Das Zeitalter des gemeinen Rechts*, part 1: *Wissenschaft* [*Manual of the Sources and Literature of the Newer History of European Private Law. Newer Period (1500-1800). The Age of Common Law. Science*], Munich, 1977, p. 555; H. SCHNITZER, "Differentienliteratur zum kanonischen Recht. Eine unbekannte Literaturgattung als Beleg zur dialektischen Kraft des kanonischen Rechts in der Privatrechtsentwicklung der Neuzeit" ["The Literature on Differences on Canon Law. An Unknown Literary Genre as Evidence of the Dialectic Power of Canon Law in the Development of Private Law in Modern Times"], in: *Walter Wilburg. Zum 70. Geburtstag. Festschrift* [*Walter Wilburg. Festschrift*

focus on the two most relevant works written by Johann Emerich von Rosbach, a German judge and scholar, and Konrad Rittershausen, a German Protestant lawyer, writer and academic teacher, whose works have been published multiple times.[16] The latter work was exceptional on many levels as it was organized in a coherent matter and applied a sophisticated set of general rules for reconciling the tensions between the two laws, and it was the most influential work out of all early modern *differentiae*.[17] While Rosbach and Rittershausen were central figures for the development of *differentiae*, it is necessary to relate them to other works published between 1500 and 1620.[18]

The question of the *quarta Trebellianica* was not contained in the works of Johann Oldendorp (1488-1567; 1541)[19], Georg Lauterbeck (ca. 1505-1578; 1548), Giovanni Paolo Lancelotti (1522-1590; 1574), or Christoph Urbach (?; 1603), most likely because the majority of these works were extremely short. Apparently, Fortun García de Ercilla y Arteaga (1492-1534; 1517) also omitted this subject in his treatise on the objectives of the two laws.[20] This difference was very briefly addressed by Peter Zachäus (?; 1566);[21] anonymous *differentiae* from 1571 provided the

for his Seventieth Birthday], Graz, 1975, p. 335-353; U. Wolter, *Ius Canonicum in Iure Civili: Studien zur Rechtsquellenlehre in der neueren Privatrechtsgeschichte* [*Studies on the Study of Legal Sources in the New History of Private Law*], Cologne, 1975, p. 55, 68-69; H. Mohnhaupt, "Die Differentienliteratur als Ausdruck eines methodisches Prinzips früher Rechtsvergleichung" ["The Literature on Differences as Expression of a Methodological Principle of Early Comparative Law"], in: B. Duran, L. Mayali (*eds*.), *Excerptiones iuris: Studies in Honor of André Gouron*, Berkeley, 2000, p. 439-458; G. Dolezalek, "Differentienliteratur" ["Literature on differences"], in: A. Cordes, H. Lück, D. Werkmüller (*eds*.), *Handwörterbuch zur deutschen Rechtsgeschichte* [*Dictionary of German Legal History*], vol. 1, Berlin, 2008, col. 1059-1061; H. Mohnhaupt, "Formen und Konkurrenzen juristischer Normativitäten im 'Ius Commune' und in der Differentienliteratur (17./18. Jh.)" ["Forms and Concurrency of Juridical Normativities in 'Ius Commune' and in the Literature on Differences"], *Rechtsgeschichte – Legal History* 25 (2017), p. 123-124; P. Alexandrowicz and M. Kola, "Differentiae iuris civilis et canonici. The Methodological Premises of an Early Modern German Legal Genre", *Glossae: European Journal of Legal History* 18 (2021), p. 171-202.

16 J. A. R. von Stintzig, *Geschichte der Deutschen Rechtswissenschaft. Erste Abtheilung* [*History of German Legal Science. First Section*], Munich, 1880, p. 414-419; A. R. von Eisenhart, "Rittershausen, Konrad", in: *Allgemeine Deutsche Biographie* [*General German Biography*], vol. 28, Leipzig, 1889, p. 698-701; T. Duve, "Konrad Rittershausen", in: *Neue Deutsche Biographie* [*New German Biography*], vol. 21, Berlin, 2003, p. 670-671.

17 For the details, see P. Alexandrowicz and M. Kola, "Differentiae", p. 175-186.

18 The details concerning the authors of *differentiae* and the characteristics of these works are omitted throughout this paper, one can find the relevant data in the 'working catalogue' (cf. the first unnumbered note).

19 After the name of the author of *differentiae* in the brackets, there were given the dates of birth and death, and the date of the first edition of his *differentiae*.

20 Fortún García de Ercilla y Arteaga, *Tractatus de ultimo fine iuris civilis et canonici, de primo principio et subsequentibus praeceptis, de derivatione et differentiis utriusque iuris, et quid sit tenendum ipsa iustitia*, Cologne, 1585. Cf. J. Portemer, *Recherches*, p. 140.

21 Peter Zachäus, *Legum civilium et sanctionum canonicarum collationes ac differentiae secundum titulos Codicis D. Iustiniani sacratissimi principis directe*, Basel, 1566, col. 103, s.f.

reader with a nice explanation of the *ratio* of the canon law approach;[22] quite a distinct approach was presented by Jean Bellon (?; 1582)[23] and a different one by Johann Paul Windeck (?-1620; 1604).[24] Still, none of these works made any references to legal literature, since they based their claims only on the authoritative texts. Wilhelm Sturio (?-1620; 1594) listed among the authors relevant for this *differentia* Hostiensis (ca. 1200-1271), Baldus, François Hotman (1524-1590) and Hugo Donellus (1527-1591) so he did not refer to any examples of practice-oriented legal literature.[25]

Four authors of *differentiae* included in their scholarly apparatuses some works related to the legal practice, and the relevance of these references for the structure of arguments will be investigated. These were Rosbach (1601), Hendrik de Hondt (Canisius, 1609), Rittershausen (1616), and Charles de Mansfeld (1619). Due to the breadth of Rittershausen's account it will be discussed in a separate section below.

Rosbach cited the glosses, Bartolus, Angelo degli Ubaldi* (1327-1407),[26] Panormitanus (1386-1445), Guy Pape (ca. 1402-1487), Ludovico Pontano (1409-1439), Angelo Gambiglioni* (?-1461), Francesco Curzio (?-1495), Jason de Mayno (1435-1519), Filippo Decio (1454-1535), Nicolaas Everaerts (ca. 1462-1532), Marco Antonio Natta (1500-1568), Rolando della Valle (1500-1599), Diego de Covarrubias y Leyva (1512-1587), Iacopo Filippo Porzi (1516-1562), Antoine Leconte (1517-1586),[27] Jacques Cujas (1522-1590), Hotman, Andreas Gaill (1526-1587) and Petrus Peckius (1529-1589).[28] From this list at least seven works may be considered as linked directly to legal practice, and all of them appeared only at the end of Rosbach's account in the closing referencing list, but it seems necessary to sketch the main lines of his argument to evaluate the relevance of this kind of literature for the German scholar. Interestingly, the alternative title of Rosbach's work

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22 Anonymous, *Differentia iuris utriusque civilis et canonici*, in: Theodor Straitman, *Harmonia titulorum utriusque iuris*, Cologne, 1571, num. 8, fol. 318-320.

23 Jean Bellon, *Antinomiarum iuris dissolutiones*, Wittenberg, 1582, fol. 19-24.

24 Johann Paul Windeck, *De theologia iureconsultorum libri duo*, Cologne, 1604, cap. 38, fol. 146-149.

25 Wilhelm Sturio, *Praestantia iuris civilis Iustinianei prae canonico pontificio: centuria differentiarum ex divinae legis et aequi praescripto demonstrata*, Basel, 1594, num. 61, s.f.

26 The names with * marks are the names of the authors which will require deeper investigation of the sources for confirmation, but this is a marginal point for this paper (these were authors of works which were not practice-oriented).

27 The reference: '*Contin. in q. Iur.*' (Johann Emerich von Rosbach, *De comparatione iuris civilis et canonici, in quo utriusque differentia, seu diversa constitutio ostenditur*, Frankfurt, 1601, tit. 7, comparatio 2, num. 11, fol. 63) contains most likely a printer's typographical error and should be read 'Contiu. in q. Iur.' and indicated Antoine Leconte's *Disputationes iuris civilis*. Otherwise the reference is not clear and the closest I found is Jacobus Concenat and his *Quaestiones iuris singulares* but it is not a convincing identification. For help with this reference I am particularly grateful to Tymoteusz Mikołajczak.

28 Johann Emerich von Rosbach, *De comparatione*, tit. 7, comparatio 2, num. 5-14, fol. 62-64.

in the second edition already suggested that addressing legal practice was among his objectives.[29]

The chapter dedicated to the *quarta Trebellianica* consisted of two *comparationes*. The first one dealt with a father who entered a monastery and after his death the right of his son to the legitim was discussed. As it was a marginal *differentia* on this subject it will not be discussed here. The second one was dedicated precisely to the question of two fourths. Rosbach started with the description of the civil law account and provided two *rationes* to support this solution. Firstly, he explained that the *ratio* here was the concurrent character of the legitim and the *quarta Trebellianica* (*e.g.* it was not possible to merge their two distinct *causae lucrativae*). Secondly, he argued that from what the party did one should infer what was most valid according to law. He showed that the heir could certainly not combine the *quarta Trebellianica* and the legitim. If he had obtained either of them, he was no longer entitled to the other. He followed with the argument *a maiori ad minus* in the explanation of why it did not change the situation when the heir was established *sub conditione*. In the latter case the heir benefitted more from keeping the part of the inheritance comparing to the unconditioned heir who was more burdened as he was forced to restore the share. Also the *naturalis ratio* supported this argument as '*qui in uno gravatur, in alio relevetur*'.[30] The latter argument however was also criticized by some authors, and here Rosbach listed Hotman, Cujas and Leconte. Only in the last part of his account did Rosbach address canon law and make use of practice-oriented legal literature. He explained that canon law allowed the heir to keep two shares when the beneficiary of a *fideicommissum hereditatis* was established '*sub conditione, vel in diem, veluti si sine liberis decedat*'. The main reason for this was that the legitim was considered to arise from natural law and any burden should be separated from the legitim. Consequently, in the case of a *fideicommissum* the heir can also deduce the *quarta Trebellianica* separately to the portion from the legitim as a *fideicommissum* was not binding on the basis of natural law. Rosbach argued that the canon law approach had become the *communis opinio*. To justify this final observation he added a long list of references to eleven works (with some comments of the author), seven of which were based on legal practice. The reference to Gaill served as a subsidiary list of secondary literature ('*ut testatur Gail* (…)

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29 JOHANN EMERICH VON ROSBACH, *Thesaurus receptarum differentiarum iuris civilis et canonici, ad praxin forensem accommodatarum: in quo de utriusque collatione, vel diversa potius constitutione, non tantum affatim disseritur; verum etiam, quaenam in uno quoque foro hodierna die observetur, vel in desuetudinem abierit, ad oculum quasi demonstratur: iudicibus tam ecclesiasticis, quam secularibus, nec non causarum patronis in utroque foro versantibus, apprime utilis et necessarius: praeterea decisionibus quibusdam huc praecipue spectantibus illustratus, et ex bibliotheca nobilissimi iurisconsulti Emerici à Rosbach, in lucem denuo limatior editus*, Frankfurt, 1605. Hereinafter the first edition will be used which was cited above.

30 JOHANN EMERICH VON ROSBACH, *De comparatione*, tit. 7, comparatio 2, num. 10, fol. 63. This phrase could be found also in *consilia* of Everaerts in the consultation dedicated to the same subject, see NICOLAAS EVERAERTS, *Consilia sive responsa*, Arnhem, 1642, cons. 17, num. 4, fol. 93.

ubi pro communi plures allegat'),[31] as Rosbach indicated the passage from Gaill which was dedicated to listing the learned authors who supported the *communis opinio*.[32] To Gaill, Rosbach added two other works (by Covarrubias and Angelo) and these initial references may be interpreted also as a statement of Rosbach's personal opinion, as he did not explicitly indicate whether it was civil or canon law that was to be applied in the case of the *quarta Trebellianica*, but he straightforwardly indicated authors who supported the canon law approach. It was followed by a chain of six references to pragmatic legal literature. Two of them were not precise (Della Valle) or even incorrect (Natta).[33] The remaining four presented the theoretical accounts on the *quarta Trebellianica*: Decio focused on doctrine, while Pontano and Curzio in the referred passages more precisely discussed the detailed cases related to this issue (in the latter case Rosbach even quoted Curzio: '*ubi dicit quod illa opinio servetur per mundum*').[34] Finally, Pape was the only one who explicitly mentioned local laws and practices because as in this case it were *decisiones* that were referred to. The cited passage was also shorter in comparison to the other ones so Rosbach referred to the whole chapter dedicated to *quarta Trebellianica*.[35] To conclude, we can note that pragmatic literature was of certain relevance for Rosbach as it helped him to introduce the *communis opinio* on the *quarta Trebellianica*, which apparently should be followed, and it provided some links to the questions significant for practice. Still, these works were not central to his argument and appeared at the very end of his account in a joint chain of references.

De Hondt supported his argument with references to Paolo di Castro (c.1360-1441), Covarrubias and Gaill.[36] He began with a short explanation of the discrepancy between the two laws. Then he added the *ratio* which justified the canon law approach, namely that one should distinguish between what was wished for by the defunct and what was ordered by law: the legitim was ordered by law and should not be diminished, while the *quarta Trebellianica* resulted from the provision of the *de cuius* and should be given in addition to the legitim to prevent situations where a *filius* would be worse off than an *extraneus heres* (who was entitled to receive the *quarta*). This *differentia* was commonly solved in favour of canon law, but De Hondt noted that there were some who tried to harmonize the discordant laws by adding

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31 Johann Emerich von Rosbach, *De comparatione*, tit. 7, comparatio 2, num. 14, fol. 64.

32 Andreas Gaill, *Practicarum observationum tam ad processum iudiciarium praesertim imperialis camerae, quam causarum decisiones pertinentium libri duo*, Cologne, 1578, lib. 2, obs. 121, num. 6, fol. 392.

33 Rolando della Valle, *Consilia sive responsa*, Lyon, 1573, vol. 1, cons. 85, num. 9, fol. 358; Marco Antonio Natta, *Consilia sive responsa*, Venice, 1584, vol. 2, cons. 250, num. 5, fol. 13r.

34 Filippo Decio, *Consilia sive responsa*, Venice, 1575, cons. 688, num. 7, fol. 295vb-296ra; Ludovico Pontano, *Consilia*, Lyon, 1555, cons. 185, num. 4, fol. 51v; Francesco Curzio, *Consilia*, Venice, 1580, cons. 75, num. 5, fol. 200rb-200va.

35 Guy Pape, *Decisiones parlamenti Dalphinalis Grationopolis*, Lyon, 1541, q. 52, fol. 23r-23v.

36 Hendrik de Hondt, "Appendix de differentiis iuris canonici et civilis", in: idem, *Summa iuris canonici in quattuor Institutionum libros contracta*, 1609, Ingolstadt, num. 26, fol. 653-656.

to the difference the subtle circumstance which was the condition *si sine liberis decesserit*. Only when this condition was added to the *fideicommissum* was the heir entitled to keep both the legitim and the *quarta*. Here appeared references to Covarrubias as well as to Gaill, where it was claimed that it was *communiter receptum*.[37] Nevertheless, De Hondt doubted that this differentiation was justified.[38] He firstly pointed out that in this discrepancy there was no threat of sin, so each law could be observed on its forum and one should not fear to depart from this opinion of learned authors. Secondly, he added another solution in line with this differentiation, namely to detract the *quarta* first. For De Hondt the reference to the legal practice via the work of Gaill was not of the utmost importance. It appeared only as part of the explanation of the opinion of some authors and was finally questioned by De Hondt.

In the work of Mansfeld one can find references to Aristotle, Barnabé Brisson (1531-1591), della Valle and Donellus.[39] Mansfeld, in the fashion typical for legal humanism, opened his elaborations with some general remarks founded on the excerpts from Aristotle on the natural law of procreation. This led him to the conclusion that the legitim had been introduced by civil law to redeem the natural debt and to indicate a paternal *amicitia*.[40] In his account, Mansfeld focused on the difference between the legitim and the *quarta Falcidia* or *quarta Trebellianica*. It was only for this purpose that he referred to della Valle (via Denys Godefroy, 1549-1622).[41] Mansfeld praised della Valle's opinion that it was not prohibited by law to deduct two fourths from the goods of the defunct (while it was prohibited to deduce two fourths from the inheritance). The relevance of pragmatic literature for Mansfeld in this case was very limited – he did not even refer directly to *consilia*, but only

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37 Gaill, lib. 2, obs. 121, fol. 391-393.

38 Hendrik de Hondt, "Appendix", num. 26, fol. 656: '*Ubi et testatur communiter receptum esse. Sed vereor ne haec distinctio iure defendi possit propter textum* (…)'.

39 Charles de Mansfeld, *Utriusque iuris concors discordia sive canonum cum legibus hactenus aliis pugnantium reconciliatio*, Luxembourg, 1619, cap. 13, fol. 94-98.

40 Charles de Mansfeld, *Utriusque iuris concors discordia*, cap. 13, fol. 96: '*Ius civile legitimam induxit quae et debitum naturae exsolvat et paternam erga liberos amicitiam denotet*'.

41 Denys Godefroy, *Codicis Iustiniani D.N. Sacratissimi Principis PP. Augusti repetitae praelectionis libri XII notis Dionysi Gothofredi I.C. illustrati*, Lyon, 1650, col. 607-608, ad C. 6,49,6, three times mentioned Rolando della Valle. Most likely Mansfeld indicated here the note s.v. *dodrans*. It was not entirely clear to which passage Mansfeld did refer here. He wrote 'quod bene advertit Rolandus à Valle apud Gottofredum in d.l. 6' (Charles de Mansfeld, *Utriusque iuris concors discordia*, cap. 13, fol. 97). The earlier reference to Godefroy I found stated '*sic Andreas Gail lib. 1 observat. 14 sic Gottofredus in l. 5 C. si quis alteri vel sibi*' (Charles de Mansfeld, *Utriusque iuris concors discordia*, cap. 3, fol. 42). It seems that the latter reference indicates Godefroy commentary to C. 4,50,5 so the passage which pointed at Rolando should be found in 'd.l. 6' which is C. 4,50,6. However, I did not find any reference to Rolando in Godefroy's commentary on C. 4,50. Also the above-mentioned reference to Gaill did not prove to be useful in this context (cf. Andreas von Gaill, *Practicarum observationum, tam ad processum iudiciarium praesertim Imperialis Camerae, quam causarum decisiones pertinentium, libri duo*, Cologne, 1578, lib. 1, obs. 14, fol. 17-19). The other option was that '*dicto loco 6*' meant reference to the last passage from *Corpus iuris civilis* which was in this case Inst. 2,22pr, but in this case there is doubt about the meaning of '*6*' and anyway there was no mention of Della Valle in Godefroy's commentary to this passage.

limited himself to the humanist scholarship and the literature provided by his fellow scholars.

c. Rittershausen's *Differentiarum libri septem*

Rittershausen discussed the last wills in the first ten chapters of the fourth book of his *Differentiarum libri septem*.[42] Each chapter dedicated to the testamentary succession has its own internal structure, but there are some general patterns which should be signalled. Rittershausen usually provided readers with references to both *corpora iuris*. This basic element of *differentiae* was established as the core of this genre already in the late Middle Ages, so this comes as no surprise. What makes Rittershausen's work more sophisticated is that in the description of each difference he tried to show the arguments developed in favour of contesting solutions. In addition, he did not refrain from offering a solution to the tensions between the two laws. It is not always the case that we can clearly say what Rittershausen's personal opinion was, but he usually stated which law should be followed. This was a particularly useful part of his work, as it might have been applied by the legal actors who had to decide which solution available within *ius commune* should be advocated in the specific case. We should also keep in mind that his approach may be labelled as legal humanism, and in consequence he was eagerly rejecting the standard *ius commune* reading of the sources and presented the novel interpretations with the objective of a more contextual source analysis. The impact of his work on the legal genre was unprecedented.[43] I will begin with the general overview of the literature used by Rittershausen in the discussion on the *quarta Trebellianica*, and only after this will I focus on the structure of his argument and on the role of practice-oriented literature for him.

In the discussion on last wills Rittershausen made plenty of references to the sources – to the two *corpora iuris*. Within these ten chapters he made a couple of references to Scripture and one reference to a Roman literary source (Pliny). None of these is surprising in the work of the legal humanist, we can even say that more references to the Roman social context might have come naturally to Rittershausen. One may find these in other parts of his work. The secondary literature used by Rittershausen can be divided into four groups: (1) commentaries and treatises on last wills; (2) *differentiae*; (3) practice-oriented legal literature (*consilia*, *decisiones*, *observationes*, *sententiae*); and (4) other works which are difficult to assign.

The first group contains the works which were written in close relation to the authoritative sources. In his account on the *quarta Trebellianica*, the late medieval commentaries were not that relevant, but one can find here references to more recent works written by legal humanists: Johann Schneidewin (1519-1568), Cujas, Hotman,

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42 KONRAD RITTERSHAUSEN, *Differentiarum iuris civilis et canonici seu pontificii libri septem*, Strasbourg, 1668, lib. 4, cap. 1-10, fol. 120-135.

43 P. ALEXANDROWICZ and M. KOLA, "Differentiae", p. 175-186.

Hubert von Giffen (1534-1604). To these standard sources, in this part of his *Differentiarum libri septem* Rittershausen also added more specific works (*relectiones*, *tractatus*) dedicated to the testamentary succession. Here it is necessary to list such authors as Guillaume Benoît (1455-1515), Fernando Vázquez de Menchaca (1512-1569), Covarrubias, Hotman and Angelo Matteacci (1536-1600). Particularly relevant for him was Hotman's *Disputatio de quartis* – a treatise clearly linked to the subject of many *differentiae* related to last wills.

The second group of works used by Rittershausen were earlier examples taken from the *differentiae* literature. In the discussed chapter he referred only once to Rosbach while more frequently throughout his work he referred to the collections of differences of Pseudo-Bartolus and Battista. He was aware of the continuity of this legal genre and he did not have to come up with all these differences on his own. He rather had the late medieval works at hand and collated the same differences, but approached them in a more sophisticated fashion. In his comments on particular differences Rittershausen regularly claimed that there was no real difference between the two laws. Some *differentiae* were according to him fictitious tensions, as it was enough for example to properly interpret the sources of canon law to avoid the discrepancy within *ius commune*. He did not hesitate to openly criticize the *differentiae* of Battista, proving that the Italian lawyer had failed to properly refer to the source text.

To this second group one may also add a very specific work, namely a monumental one by Andrea Fachinei (1549-1609) entitled *Controversiarum iuris libri decem*. It was not so much another example of *differentiae*, but rather a much broader work in its scope. Fachinei's objective was an arduous one, namely that of presenting all the controversies within *ius commune*. It was a very detailed examination of hundreds of opinions of learned authors on the issues that were raising doubts within the scholarship. For this reason one can also trace *differentiae iuris civilis et canonici* within this work, as certainly Rittershausen did. Out of all secondary literature used by him it seems that the ten books of legal controversies by Fachinei were the most frequently used, and probably even the most relevant. We can imagine that after the identification of the differences between civil and canon law, with help of the earlier *differentiae* Rittershausen greatly benefitted from Fachinei's identification of the same controversies.

The third group is the one which is more relevant for the purpose of this paper, as the use of pragmatic literature shows the impact of local laws on the general legal doctrine. Of course, Rittershausen wrote his work at a particular time and place but it remained rather general and abstract – without many precise references to local laws. One can find them only rarely, but the influence of local legal customs and practice may be better measured by the impact of pragmatic literature on the argumentations and solutions of Rittershausen. In the discussed chapter he referred to the *consilia* of Pietro Paolo Parisio (1473-1545) and to the *consilia* of Giacomo Mandelli (1510-1555). The former were for Rittershausen apparently the most relevant source of information about the practice of canon law. He also used

practicarum observationum libri written by Gaill, while a similar work by Bernhard Wurmser (?-1521) and Hartmann Hartmann (ca. 1495-1547) was not used in this passage (as it was used elsewhere in his book). To this category we can also add the original work of Antoine Favre (1557-1624), who aimed to correct the errors of practitioners and interpreters of civil law. *Consilia* and *observationes* were certainly relevant for Rittershausen as an argumentative resource, as in the introduction to his work he listed a couple of authors of pragmatic works to indicate that this literature reflecting pragmatic legal issues was important for the structure of his whole work.[44] In the passage on the *quarta Trebellianica* he mentioned only three times examples of *sententiae* by Emanuele Soarez à Ribeira (1500-1599), while elsewhere also a collection by Giulio Claro (1525-1575) was used by him or *decisiones* by Michael Grass (1541-1595) and Gaspare Antonio Tesauro (1563-1628).

In the fourth group we can name other works, such as *De via et ratione iuris* by Matteacci, to which Rittershausen referred. These works did not share any specific characteristics.

After this literature overview, the contents of this chapter may be described. Its title states the issue of this *differentia* very clearly: is the heir to the estate burdened with bequests entitled to keep two fourths? For introducing this discrepancy between the two laws Rittershausen did not need any references to the literature. What followed was the presentation of four meanings of *quarta*. Afterwards he added the references to the works which dealt with this theoretical theme more scrupulously (Cujas, Hotman, Schneidewin). Then he sketched the structure of the answer to the title question: presentation of the sources; legal interpretations of the sources; *rationes* of civil law and *rationes* of canon law.[45] Next he provided the reader with a detailed presentation of the crucial sources, which in this case were two chapters from the *Liber Extra*.[46] Here he referred to the interpretations by Benoît and Covarrubias in line with the canon law approach, and to their critique by Hotman. To this he also added the references to Fachinei, Vázquez, and Matteacci (both to his *Tractatus de legatis et fideicommissis* and *De via et ratione iuris*). It seems from this passage that Rittershausen was not praising the canon law approach and also that he agreed that the question of the *quarta Trebellianica* was *mere civilis*, and for this reason the canon law solution should not be enforced in line with

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44 KONRAD RITTERSHAUSEN, *Differentiarum iuris*, Prooemium, fol. 10.

45 KONRAD RITTERSHAUSEN, *Differentiarum iuris*, lib. 4, cap. 9, fol. 129: '*Annotabo autem primum huius differentiae sedem, et nobiliores aliquot, qui de ea agunt interpretes: Deinde utriusque sententiae et iuris fundamenta praecipua recensebo: ex quorum collatione facile apparere possit utra sit verior, et rectae rationi convenientior*'.

46 On the margin of our investigation we may note that he explicitly mentioned *summaria* to X. 3,26,16 and 3,26,18: '*In utriusque summario dicitur, filium rogatum de restitutuenda hereditate sub conditione (…) detrahere posse primo tertiam debitam iure naturae, id est, legitimam, et deinde quartam Trebellianicam*' (KONRAD RITTERSHAUSEN, *Differentiarum iuris*, lib. 4, cap. 9, fol. 129). This reference highlights the interpretative value of *summaria* in *Liber Extra*, cf. P. ALEXANDROWICZ, "The History and Normative Significance of Summaria in the Liber Extra", *The Legal History Review* 90 (2022), p. 174.

the general rules for solving the conflicting norms of civil and canon law offered by Rittershausen in the introduction to his *Differentiarum libri septem*.[47] This presentation of canon law sources and their interpretation was supplemented with a long chain of references, including especially *decisiones* and *consilia*. Qua pragmatic literature Rittershausen referred to Gaill and his doctrinal chapter on the *quarta Trebellianica*,[48] to the *decisiones* of Tesauro,[49] Grass,[50] and Soarez,[51] and to the discussion of an error by Favre.[52] Then he added that this issue was discussed in many *consilia* of Parisio[53] so he added eight of them and also three other consultations by Mandelli.[54] The references to Parisio were not precise (without numbers) and that makes them less useful for readers, especially taking into consideration that his consultations were of moderate length. Rittershausen closed this section with two more references to Matteacci's *Tractatus de legatis et fideicommissis* and *De via et ratione iuris*. The literature to which Rittershausen referred portrayed the legal practice of late *ius commune* but it lacked links to the local legal customs and practices (with the minor exception of a short notice by Tesauro). It seems that Rittershausen's focus in the selection of these particular references from the vast ocean of the legal literature was to validate the accepted doctrinal opinion on the admissibility of detracting the *quarta Trebellianica* along with the legitim (especially in case of a conditional *fideicommissum*). He was not looking for doctrinal or

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47 Konrad Rittershausen, *Differentiarum iuris*, *Prooemium*, fol. 9-10. Cf. H. Schnitzer, "Differentienliteratur", p. 339-341; M. Schmoeckel, *Das Recht der Reformation. Die epistomologische Revolution der Wissenschaft und die Spaltung der Rechtsordung in der Frühen Neuzeit* [*Law of the Reformation. The Epistemological Revolution of Science and the Split in Legal Order in the Early Modern Period*], Tübingen, 2014, p. 73-74; P. Alexandrowicz, and M. Kola, "Differentiae", p. 179-186.

48 Andreas Gaill, *Practicarum observationum*, lib. 2, obs. 121, fol. 391-393.

49 Gaspare Antonio Tesauro, *Novae decisiones Sacri Senatus Pedemontani*, Frankfurt, 1597, dec. 252, fol. 585-586.

50 Michael Grass in: *Thesaurus communium opinionum seu conclusionum sive receptarum sententiarum, excellentium utriusque iuris consultorum, super causis tam criminalibus quam civilibus continens omnes omnium huius argumenti adhuc editas lucubrationes*, Frankfurt, 1584, vol. 2, § Trebellianica, q. 4, fol. 231va-232rb.

51 Rittershausen listed simply letters 'F' and 'T' from Soarez, which makes it an imprecise reference. Most likely he meant these passages: Emanuele Soarez à Ribeira, *Thesaurus receptarum sententiarum, quas vulgum interpretum communes opiniones vocat, in alphabeti seriem digestarum post omnes omnium ea de re lucubrationes*, Venice, 1569, lit. F, num. 119, fol. 92v or num. 253-255, fol. 102v; lit. T, num. 309-311, fol. 243r.

52 Antoine Favre, *De erroribus pragmaticorum et interpretum iuris chiliadis pars prima in decades XXV distincta*, Geneva, 1623, decas 11, error 7, fol. 281-287.

53 Pietro Paolo Parisio, *Consilia*, Venice, 1570, vol. 1, cons. 93, fol. 166ra-167va (this seems not to be an accurate reference, it rather should be vol. 2, cons. 93, num. 42-53, fol. 190va-191ra); vol. 2, cons. 45-47, fol. 121vb-125va; vol. 3, cons. 1, fol. 2ra-6va, cons. 25, fol. 38va-40rb.

54 Giacomo Mandelli, *Consilia*, Frankfurt, 1577, cons. 7, num. 6, fol. 12rb; cons. 17, num. 13-14, fol. 34va; cons. 41, num. 1-2, fol. 59r. On Mandelli, see M. Gigliola di Renzo Villata and G. P. Massetto, "La Facoltà legale. L'insegnamento del Diritto civile (1361-1535)" ["The Legal Faculty. The Teaching of Civil Law (1361-1535)"], in: D. Mantovani (ed.), *Almum Studium Papiense. Storia dell'Università di Pavia* [*The History of the University of Pavia*], Milan, 2012, vol. 1, p. 429-466.

practical controversies and subtleties at this point, as it was only a preparatory step for the development of his argument.

What was the purpose of providing so many references? It seems that it was mostly rhetorical action, as right after listing all these learned authors who included in their works the interpretation of the discussed canons in line with the canon law approach, Rittershausen could reject this approach and move swiftly to the presentation of *rationes* which were developed by the authors supporting the civil law approach.[55] Here he regularly mentioned Fachinei and Hotman and we may say that these two were truly relevant for Rittershausen's account – he did not only mention them in the list of secondary authors but closely followed their arguments. For additional *rationes* he added references to Fachinei and Hotman also other authors, such as Gaill, Rosbach, Azo, Favre, and Giffen. Only in the case of Gaill and Favre were the references related to legal practice, but they were not crucial for the argument and were a reiteration of the references given earlier.[56] Favre's work however was useful for Rittershausen to explain (as he did regularly) that even the solution which apparently was inspired by canon law in fact could be inferred also from a close reading of the *Corpus iuris civilis* (Favre was also mentioned once again a few sentences later).[57] The German scholar interpreted various *allegationes* from civil law which could be incorrectly identified as examples of detraction of the two shares by the heir (*detractio duplex*) and insisted that civil law did not offer this solution. The reference to Rosbach was also interesting, as Rittershausen criticized part of his first argument in favour of civil law founded on the concurrence of *causae lucrativae* because according to Ritterhausen it was *ratio infirmior*, and it was extracted only from the general rules and thus incorrect.[58] Rittershausen's argument is clear and persuasive – he was able to excerpt from the vast literature the decisive *rationes* to support his claims. In this task the practice-oriented literature was not relevant for him, except for the work of Favre which however was only loosely connected to the actual legal practice.

Only after the persuasive and detailed presentation of the *rationes* of civil law did Rittershausen mention the canon law approach, and much more briefly. In fact, he limited himself to a very harsh critique of the canon law approach to the discussed question and also followed the work of Hotman on this point. Rittershausen agreed with Hotman that it was a stupid error of canonists petrified by the pontifical authority that had led to the spread of this incorrect doctrine.[59] Finally, at

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55 Konrad Rittershausen, *Differentiarum iuris*, lib. 4, cap. 9, fol. 129: '*Sed omissis auctoribus videamus breviter rationes: et quidem pro una detractione iuris civilis haec faciunt*'.

56 Andreas Gaill, *Practicarum observationum*, lib. 2, obs. 121, num. 7, fol. 392; Antoine Favre, *De erroribus pragmaticorum*, decas 11, error 7, fol. 281-287.

57 Konrad Rittershausen, *Differentiarum iuris*, lib. 4, cap. 9, fol. 132.

58 Konrad Rittershausen, *Differentiarum iuris*, lib. 4, cap. 9, fol. 131: '*Sed haec ratio est infirmior (et ex brocardicis principis extructa*)'.

59 Konrad Rittershausen, *Differentiarum iuris*, lib. 4, cap. 9, fol. 133: '*Ex his quae dicta sunt facile est intellectum, ius illud de duabus quartis ex errore primo natum, deinde auctoritate pontificia*

the end he described some subtleties of the canon law approach. He called them limitations of the error of canon law – while from the canon law perspective these were exceptions to the standard canon law approach.[60] Here Rittershausen referred to a technical passage from Gaill[61] and mentioned at various places six consultations of Parisio.[62] The *Consilia* of Parisio were relevant for Rittershausen only to exemplify how these exceptions were addressed in the literature. It does not seem that he wanted to highlight the practical relevance of these cases, as again he only added general references without numbering precise paragraphs and did not comment on their contents. It is interesting that he dedicated some space to these exceptions while at the same time he considered this approach in general to be more or less absurd.[63]

From this overview of one chapter dedicated to last wills by Rittershausen one can learn that there were many literature references, but their relevance was not equal. It seems that three works from different groups were crucial for Rittershausen on this point: *Disputatio de quartis* by Hotman, *Controversiarum iuris libri decem* by Fachinei, and *Consilia* by Parisio. However, while the first two influenced Rittershausen's argument, the third one was merely a useful storehouse of opinions in line with the canon law approach. The references to Parisio influenced only the structure of the final part of Rittershausen's account, but Parisio certainly did not convince the German author of *Differentiarum libri septem* to favour the canon law approach.

3. Legal practice and theoretical discourse of *ius commune*

The early modern legal scholarship dedicated to the legal practice in many instances referred to the *quarta Trebellianica* as the controversies linked with this institution affected the legal practice. The sources examined above provided just a glimpse of how often this issue was discussed in the literature. Scholarship shows the relevance of the *quarta Trebellianica* for local laws and practices *e.g.* in Italy,[64] France,[65] or

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confirmatum esse. Unde Hotomannus (…) *stultum errorem canonistarum vocare non dubitavit, qui tamen passim toto fere terrarum orbe ius fecerit*'.

60 Konrad Rittershausen, *Differentiarum iuris*, lib. 4, cap. 9, fol. 133-134: '*Sed priusquam ab hac differentia abeamus, quaedam notandae sunt limitationes seu restrictiones illius ex errore nati iuris canonici quas tradiderunt doctores sex. Igitur duplex illa detractio locum non habet*'.

61 Andreas Gaill, *Practicarum observationum*, lib. 2, obs. 121, num. 11, fol. 393.

62 Pietro Paolo Parisio, *Consilia*, vol. 1, cons. 93, fol. 166ra-167va (this seems not to be an accurate reference, it rather should be vol. 2, cons. 93, num. 42-53, fol. 190va-191ra); vol. 2, cons. 17, fol. 49ra-50va; cons. 30, fol. 94rb-96rb; cons. 81, fol. 166va-168va; vol. 3, cons. 1, fol. 2ra-6va; cons. 27, fol. 44rb-45rb.

63 Cf. Konrad Rittershausen, *Differentiarum iuris*, lib. 4, cap. 9, fol. 134: '(…) *quod manifeste esset absurdum et contra testatoris voluntatem, quam fere elusoriam faceret. Absurda autem, et ea ex quibus absurdus resultaret intellectus, vitanda sunt*'.

64 T. Kuehn, "Materia est valde periculosa: Interpreting Testaments in Quattrocento Florence", in: M. Gigliola di Renzo Villata (*ed.*), *Succession Law, Practice and Society in Europe across the Centuries*, Cham, 2018, p. 264-265.

65 X. Prévost, "Between Practice and Theory: Succession Law According to Jacques Cujas (1522-1590)", in: M. Gigliola di Renzo Villata (*ed.*), *Succession Law, Practice and Society in Europe across the Centuries*, Cham, 2018, p. 370.

Catalonia.[66] The *ius commune* authors focusing on practice varied in their approach to the *quarta Trebellianica*: some of them referred broadly to the scholarship on the subject, some of them focused on detailed case analysis, some of them included in their works notes on the local laws and practices. To what extent were these elucidations relevant for the authors of scholarly works within *ius commune*? All remarks on this point below are limited to this one examined case, *i.e. differentiae* on the *quarta Trebellianica*.

The impact of pragmatic literature on *differentiae* was noticeable but limited. Firstly, we should note that this literature did not influence the late medieval works, which was in part caused by the fact that it was at the turn of the sixteenth century that the volume of this literature escalated quickly. It seems obvious that late medieval and early modern *differentiae* differed a great deal. This investigation on the testamentary succession again proves the conclusions from the earlier research. Secondly, many examples of early modern *differentiae* were short works or treatises which did not focus on a broad and complex contextualization of the discrepancies between the two laws. Thirdly, in the most relevant works within the genre, *i.e.* the *differentiae* of Rosbach and Rittershausen, the practice-oriented literature was used extensively. However, it was not the most relevant sort of legal scholarship that was used by the German scholars, as it appeared mostly in the long chains of references crowning the presentation of selected issues. It was legal commentaries and, more importantly, the works of legal humanists that most significantly influenced the structure and contents of the *differentiae* produced by Rosbach and Rittershausen. The references to pragmatic literature were of a subsidiary nature, as they only supplemented the argument or, more importantly, they were added to illustrate particular opinions presented in the legal science. This was especially noticeable in Rittershausen's long chain of references, which mostly contained pragmatic literature and served to show the dominant opinion of legal scholars which was openly contested by Rittershausen. Also, at the end of his account on the *quarta Trebellianica* he extensively referred to Parisio's *Consilia*, but this was not meant to show appreciation for his scholarly or practical achievements but rather to depict the canon law approach, which was nevertheless considered erroneous or even absurd by Rittershausen.

The practice-oriented literature did influence *differentiae* on the *quarta Trebellianica* and thanks to this literature the arguments of Rosbach and Rittershausen were more nuanced and complex than the other late medieval and early modern accounts. The role of this literature was secondary, as for the theoretical discourse of Rosbach and Rittershausen it was merely an addition to the legal discourse founded on the new paradigms of legal humanism. The central source of new interpretations and reasonings was the rereading of the legal sources and the

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66 T. Mikes and T. de Montagut, "Family Succession Wars: Succession Norms and Practices in Medieval and Modern Catalonia", in: M. Gigliola di Renzo Villata (*ed.*), *Succession Law, Practice and Society in Europe across the Centuries*, Cham, 2018, p. 54.

contemporary legal practice. Interestingly, some legal humanists were very critical towards the scientific value of *consilia*, but in this case we see a more favorable approach.[67] We should notice that the authors of *differentiae* did not try to provide all possible references and artificially expand the apparatus in their works. They kept it concise but long enough to convey the impression of the dominant opinion in the past scholarship. They also might have liked to have references to the legal practice to add another layer to their explanation of the discrepancies between the two laws. The profile of these two examples of *differentiae* suggests that they were mostly written for academic or scholarly purposes, but the inclusion of references to legal practice shows that Rosbach and Rittershausen did not rule out their works being useful for practitioners too. In case of Rosbach it was also evident in the title of his work directed explicitly to legal practice. Lastly, we should note that there were no direct references to local statutory law and customs in the examined passages. This type of references occurred at times elsewhere, or were even substantial in some later *differentiae*, but it was not a typical characteristic of this legal genre.

4. Conclusion: the dynamics of the relation between legal practice and scholarly discourse

The practice-oriented legal literature was present in the scholarly discourse, however it was not always crucial for introducing new arguments inspired by local customs, but rather served as a source of knowledge about the past and present applications of legal provisions. References to legal practice justified the statements about the dominant opinion of learned authors or illustrated some subtleties of the discussed doctrines. For this reason they were at the same time important elements of the reasoning and were only of secondary value, as they supplemented the main arguments and did not shape them.

Any generalizations concerning the legal literature used in the early modern books are dubious. Only careful study of the precise issues may show which secondary sources were really relevant and influential, and which served merely as ornaments. For this reason the conclusions of this investigation may only be extrapolated with care. How relevant were local laws and practices for the scholarly discourse of *ius commune*? On this thin evidence we may say that the local testamentary laws and practices were of very limited relevance for the general doctrines of civil and canon law on this matter. There were references to *consilia*, *decisiones*, *sententiae*, *observationes*, but usually they did not play a crucial role as argumentative resources for the authors of works on *differentiae*. The practice-oriented sources were rather used to justify some concepts or interpretations – not to introduce new solutions or to challenge the established traditions. It was an intriguing

67 Cf. W. Druwé, *Loans and Credit*, p. 49-50.

hypothesis that inspired this research, namely that the pragmatic literature served as the transmitter of the local customs and practices into the scholarly debates of the learned laws, but it does not seem to have been the case with *differentiae* on the *quarta Trebellianica*.

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Part III

PARTICULAR LAW AND TESTAMENTARY FREEDOM

LAST WILLS, POSTMORTAL DISPOSITIONS AND TESTAMENTS IN EARLY MODERN SAXONIAN LAW: WITH *IUS COMMUNE* FROM *SACHSENSPIEGEL* TO THE *KURSÄCHSISCHE KONSTITUTIONEN*

Adrian SCHMIDT-RECLA

Abstract – This paper examines whether and to which degree early modern Saxonian law, in particular the verdicts of the Leipzig bench of jurymen (*Schöppenstuhl*), acknowledged the possibility to dispose post-mortally. This is of special interest because the law of this Central European region was influenced by both a strong tradition of medieval law (*Sachsenspiegel*) and academic dogmata of learned law (*ius commune*). Jurisdiction and legislation had to deal with these particularly different influences. One of the legal outcomes of this merger were the Kursächsische Konstitutionen (KSK, 1572). This paper also intends to provide some preliminary thoughts as to whether the jurisdiction of the Leipzig *Schöppenstuhl* was used to design the KSK.

1. Introduction

Individual freedom can be estimated as to be both a principle of law and a purpose of legal regulation. Respect to family ties, corporate commitments or religious obligations and coercion resulting from these are its opponents. Civil law has a sensitive measuring device to inform researchers about the relation between both at a certain time in a certain space. It is the fact whether (and, if given, the degree to which) the law acknowledges the possibility to dispose post-mortally. This paper asks for the contributions of the law of the Electorate of Saxony of the sixteenth century – as far as it refers to this possibility or power.

By doing so it refers to secular and civil law only; canon law is – with one exception – out of this contribution's radar. The reasons why this paper focuses on early modern Saxony are the following. First, Saxony has then been one of the key territories of the Holy Roman Empire. Its rulers (and, in the sixteenth century, legislators) have been prince-electors. Persons giving legal advice to them were therefore top-level lawyers and involved into the Reich's politics and law making. Secondly, much of the economic power of the Reich was located in the electorate.

Trade flourished and early modern Saxony is nowadays estimated to have been one of the most prosperous territories of the Empire and even to have been a Lutheran role model state[1] – thus there has been galore of land and wealth to be disposed of. Thirdly, the Electorate of Saxony seen with the eyes of a lawyer of the sixteenth century had – contrary to other territories of the Empire – a rich and long-lasting tradition of written law which was by then not or merely to a limited extent influenced by institutions of Roman law or *ius commune*. Eike von Repgow's (ca. 1180-1235) famous *Sachsenspiegel*, its gloss written by Johann von Buch (ca. 1290-1356), and the Magdeburg municipal law (first laid out in written form in 1188) have been well known, widely spread through many manuscript copies, academically discussed, and frequently used in court ever since the thirteenth century. Concerning law one could assume that persons who referred to *ius commune* in their legal affairs could not succeed with it, but were instead running into Eike of Repgow's brick wall of norms laid out in the *Sachsenspiegel*. The law of last wills is therefore perfect to discern whether the rules of the *Sachsenspiegel* and Magdeburg municipal law were due to the reception of *ius commune*.

2. Questions and sources

a. Questions arising

The sixteenth century was a time of vivid discussion among academically learned jurists and practitioners of law. Academic training in university law schools in Saxony[2] has been taking place since 1437, when legal training based on the *Corpus iuris civilis* took its start in Leipzig (Wittenberg followed in 1502 and Jena in 1558). Since then, learned jurists have entered positions in patrimonial, municipal and electoral councils and courts.[3] The law of inheritance was an object of their daily work and quickly they were raising questions like the following.

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1 J. BRUNING, "August I.", in: *Sächsische Biographie*, online database in Institut für Sächsische Geschichte und Volkskunde, www.saebi.isgv.de, accessed 15 May 2023.

2 The Duchy of Saxony had been divided since 1485 (when the 'Leipzig partition' took place) into the Electorate of Saxony run by the so called Ernestinians and the Duchy of Saxony led by the so called Albertinians. Ernestinian Saxony (present day Thuringia) held the electorate position by 1547, then emperor Charles V (1500-1558) handed it over to the Albertinians in Dresden.

3 H. LÜCK, "Gerichte in der Stadt. Konkurrenz und Kongruenz von Gerichtsbarkeit in Kursachsen während des 15. und 16. Jahrhunderts" ["Courts in the City. Competition and Congruence of Jurisdiction in Electoral Saxony during the 15th and 16th Centuries"], in: H. BRÄUER (*ed.*), *Die Stadt als Kommunikationsraum* [*The City as Communication Space*], Leipzig, 2001, p. 567-585; G. KISCH, *Zur sächsischen Rechtsliteratur der Rezeptionszeit. Dietrich von Bocksdorfs 'Informaciones'* [*On the Saxon Legal Literature of the Reception Era. Dietrich von Bocksdorf's 'Informaciones'*], Leipzig, 1923, p. 21, n. 1; A. KRIEBISCH, *Die Spruchkörper Juristenfakultät und Schöppenstuhl zu Jena. Strukturen, Tätigkeit, Bedeutung und eine Analyse ausgewählter Spruchakten* [*The Jury of the Faculty of Law and Jurymen's Bench in Jena. Structures, Activity, Meaning and an Analysis of Selected Sentences*], Frankfurt am Main, 2008.

For instance, medieval Saxonian law (*ius proprium*) did not provide specific rules on testaments (*i.e.* unilateral postmortal designations of an heir) – should those provided by *ius commune* be applied? *Ius proprium* did not prohibit contractual postmortal dispositions (and people were acquainted to them) while *ius commune* declared them against morality (*contra bonos mores*) – which approach should be followed? The *Sachsenspiegel* granted an objection (*Erbenlaub* or *erven gelof*) to potential heirs once the bequeather made a (postmortal) donation concerning an estate[4] – while *ius commune* did not – should it be granted anyway? *Ius commune* protected certain heirs with a so-called legitimate portion (*portio legitima*) once the testator did not designate them as a testamentary heir, while *ius proprium* (*Sachsenspiegel* and Magdeburg municipal law) did not – was there a chance to subtract the *legitima* from a contractual disposition concerning land for instance, too?[5] And what about the seemingly archaic horseman's proof as a trial of strength that is reported in the *Sachsenspiegel*?[6] Was it actually in use in the sixteenth century or has it been overruled by more modern thinking or time? Nobody will doubt or has ever doubted since the sixteenth century – when the era of the *specula iuris* had been over – that questions like these were finally to be answered by the legislator. But this answer took time; for the Electorate of Saxony until the Elector enacted the *Kursächsische Konstitutionen* (henceforth: KSK) in 1572.

b. 'Law in the books' and 'law in action': The Leipzig compilation of jurymen's votes

Meanwhile, parties, litigants, counsellors and courts had to deal with or decide upon single law suits. Moreover, people made their everyday dispositions in practice regardless of what was discussed among experts and regardless of what was in the law books. Thus, they filed law suits in a steady flow. The latter fact has been the focus of the author's previous research concerning postmortal dispositions in medieval legal sources of reference.[7] This research, which has recently been

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4 K. A. ECKHARDT (*ed.*), *Das Landrecht des Sachsenspiegels* [*The Land Law of the Sachsenspiegel*] [Reihe Germanenrechte. Texte und Übersetzungen = Series of Germanic Law. Texts and Translations, 14] Göttingen, 1955, Erstes Buch, Artikel 52, S. 1 (I,52,2): '*Ane erven gelof unde ane echtes dinc ne mut neman sin egen noch sine lute geven*', roughly translated as 'without the heir's consent nobody must give away his own (or dispose of it)'

5 For those (and more) differences between *Ius commune* and medieval Saxonian law cf. *e.g.* G. GÜLDEMUND, *Das Erbrecht der Buch'schen Glosse* [*The Law of Inheritance of Buch's Gloss*], Cologne, Vienna, 2021, p. 194-230.

6 K. A. ECKHARDT (*ed.*), *Das Landrecht des Sachsenspiegels*, Erstes Buch, Artikel 52, S. 2: '*Alle varende have gift de man ane erven gelof in allen steden, unde let unde liet gut, al de wile he sek so vermach, dat he, begort mit eneme swerde unde mit eneme scilde, op en ors komen mach, van eneme stene oder stocke, ener dumelnen ho, sunder mannes hulpe, deste men eme dat ors unde den stegerep halde; swen he disses nicht dun ne mach, so ne mach he geven noch laten noch lien, dat he it jeneme untverne, de is na sineme dode wardende is*'.

7 A. SCHMIDT-RECLA, *Kalte oder warme Hand. Verfügungen von Todes wegen in mittelalterlichen Referenzrechtsquellen* [*Cold or Warm Hand. Acts of Last Will in Medieval Legal Sources of Reference*], Cologne, Vienna, 2011.

confirmed,[8] has shown that postmortal dispositions without knowledge of Roman testamentary law were in mass-use ever since the thirteenth century, especially in territories of Saxonian law[9], and that the *Erbenlaub* as a condition for validity of postmortal dispositions concerning estates did not play an important role in non-contentious jurisdiction. Following this previous research this paper sheds some light on the practice of contentious jurisdiction in sixteenth-century Saxony concerning the above-mentioned questions. Archives host much empirical material – the files of the Leipzig jurymen's bench (the *Schöppenstuhl*) alone fill today 55 running meters in Dresden. The files of the Jena jurymen's bench (stored in Weimar) are as voluminous. Numerous files resting in archives in Leipzig, Weimar and Dresden – to name just a few – have hitherto not been considered or even looked into. An extensive analysis of this documentation falls outside the remit of this paper. The present contribution's aim is more limited, namely to counsels and sentences concerning postmortal dispositions contained in a manuscript stored in the Domstiftsbibliothek Bautzen and in its entirety edited by a Leipzig scholar in 2009. This manuscript contains 1.346 votes (*consilia*) by either a single or two or more members of the bench, as well as sentences – *i.e.* decisions of the bench as a court – of the Leipzig *Schöppenstuhl* dating from 1509 to 1598.[10]

The Leipzig *Schöppenstuhl*, by origin a municipal court, was promoted in the sixteenth century to an electoral high court in Saxony which quickly dwarfed the jurisdiction of the Magdeburg *Schöppenstuhl* completely. Finally even the former Saxonian appeal to the higher court in Magdeburg (*Oberhofzug*) was cut off and redirected to Leipzig for claimants, defendants, and juries who litigated in the Electorate of Saxony as of 1547.[11] The Leipzig jurymen thus responded as a court when addressed as such by another court with a formal sentence, but they also gave *consilia* when being asked by a private or a corporate constituent. A sentence was always introduced by the clause '*spreke wy for recht*' ('we pronounce as law') and ended by the abbreviation '*V.R.W.*' ('*Von Rechts Wegen*' – for 'by operation of law'), while a consilium was not. The votes are decisions only – they do not mirror the content of the particular action or lawsuit entirely.[12] The Leipzig promotion as

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8 G. Güldemund, *Das Erbrecht der Buch'schen Glosse*, p. 228.

9 A. Schmidt-Recla, *Kalte oder warme Hand*, p. 461-597; cf. K. Fokt, C. Speer and M. Mikuła (*eds.*), *Liber Vetustissimus Gorlicensis. Das älteste Görlitzer Stadtbuch 1305-1416* [*The Oldest Town Book of Görlitz*], vol. 1, Kraków, 2017.

10 J. Pätzold, *Leipziger gelehrte Schöffenspruchsammlung. Ein Beitrag zur Rezeptionsgeschichte in Kursachsen im 16. Jh.* [*Collection of Learned Sentences from the Leipzig Jurymen. A Contribution to the Reception History in Electoral Saxony in the 16th Century*], Berlin, 2009.

11 A. Krey, "Oberhof" ["High Court"], in: A. Cordes *et al.* (*eds.*), *Handwörterbuch zur deutschen Rechtsgeschichte* [*Dictionary of German Legal History*], vol. 25, Berlin, 2017, col. 44-56; J. Weitzel, *Über Oberhöfe, Recht und Rechtszug. Eine Skizze* [*On High Courts, Law and Legal Proceedings. A Sketch*], Göttingen, 1981.

12 To comprehend this, archival research in Dresden concerning the Schöppenstuhl-files would be needed.

mentioned before went hand in hand with the replacing of lay jurymen who had hitherto been members of the court by learned legal experts.[13]

This paper is not about describing the manuscript;[14] the editor unlocked it by all registers necessary. The content of the compilation is worth studying especially because of two reasons. First: The jurymen justified their decisions and *consilia* with allegations to either *ius commune* or *ius proprium*.[15] This is – concerning the sixteenth century – rather remarkable. Secondly: The compilation (or – unknown – other compilations of the same type) might have been used as a source book for legislation. In 1572 the Elector of Saxony, August I (1526-1586),[16] promulgated as an electoral act the KSK.[17] Probably these jurymen's votes compiled in the manuscript (and more) were known to the legal experts who contributed to the KSK. In at least three cases, jurymen (Michael Teuber, 1524-1586; Jakob Thoming, 1524-1576;[18] and Matthäus Wesenbeck, 1531-1586[19]) were also members of the Leipzig Law School (in the case of Thoming)[20] and the Wittenberg Law School (in the cases of Teuber and Wesenbeck) and members of the staff collecting material for the KSK. Additionally, all three were close colleagues of August's Counsellor of Court, Georg Cracau (1525-1575), who had been a student of Michael Teuber some years before and was the main driving force behind the KSK. Thus, the compilation is a link between law in action and law in the books – and an example to prove if (and if so, to what extent) *ius commune* replaced traditional Saxonian law by a political decision.

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13 J. Pätzold, *Leipziger gelehrte Schöffenspruchsammlung*, p. 20-28.

14 For this cf. *Ibidem*, p. 37-40 and p. 40-103.

15 Pätzold found that citations (all in all 2.780 citations of normative legal sources in 1.346 votes) of *ius commune* preponderate those of *ius proprium*; cf. *Ibidem*, p. 77-85. But this general statement does not concern inheritance law in special.

16 J. Bruning, "August I.".

17 *Kursächsische Konstitutionen* [*Constitutions of Electoral Saxony*], in: W. Kunkel, H. Thieme and F. Beyerle (*eds.*), *Quellen zur Neueren Privatrechtsgeschichte Deutschlands* [*Sources of the Newer History of Private Law in Germany*], vol. 2: *Landrechte des 16. Jahrhunderts* [*Land Laws of the 16th Century*], Weimar, 1938; to which cf. H. T. Schletter, *Die Constitutionen Kurfürst August's von Sachsen vom Jahre 1572. Geschichte, Quellenkunde und dogmengeschichtliche Charakteristik derselben* [*The 1572 Constitutions of Elector August of Saxony. History, Source Study and Dogmatic Historical Characteristics*], Leipzig, 1857; G. Buchda and H. Lück, "Art. Kursächsische Konstitutionen" ["Constitutions of Electoral Saxony"], in: A. Cordes *et al.* (*eds.*), *Handwörterbuch zur deutschen Rechtsgeschichte* [*Dictionary of German Legal History*], vol. 18, Berlin, 2013, col. 354-361.

18 Cf. A. Ritter v. Eisenhart, "Thoming, Jakob", in: *Allgemeine Deutsche Biographie* [*General German Biography*], vol. 38 (1894), p. 112.

19 Cf. A. Ritter v. Eisenhart, "Wesenbeck, Matthäus", in: *Allgemeine Deutsche Biographie* [*General German Biography*], vol. 42 (1897), p. 134-138, and A. Kriebisch, "Matthäus Wesenbeck (1531-1586)", in: G. Lingelbach (*ed.*), *Rechtsgelehrte der Universität Jena aus vier Jahrhunderten* [*Legal Scholars of the Jena University from Four Centuries*], Jena, 2012, p. 51-66.

20 Thoming contributed to the KSK and to the Bautzen manuscript personally.

3. Jurymen's votes concerning last wills

The following remarks refer to the Bautzen Manuscript of jurymen's votes only. Any further quotation follows the numbering and pagination given by Pätzold's edition. Systematically the manuscript contains sentences and *consilia* concerning (1) unilateral donations, (2) bilateral (and very often reciprocal) testamentary contracts (for that term see yet below), and (3) testaments. The term 'donation' applies here to dispositions by which a subject matter (or a number of matters) was granted to another person who is not mentioned in the court's or municipal's registries to have been present whilst the disposition was taken. In this perspective one can find:

a. Gifts by last will – conditional donations, donationes mortis causa[21]

Jurymen who worked out the sentences voted that such conditional donations were valid in both *ius commune* and Saxonian law when they were given *inter vivos* and when – according to *ius commune* – the *legitima* was not derogated.[22] Otherwise the *querela inofficiosi testamenti* could successfully be filed.[23] According to the jury, the donator was – although perhaps committing a sin as far as religion would be taken into account – by law free to give goods postmortally to foreigners or to one single child – even if he had two or more children.[24] Moreover, once the donation comprehended an estate, the above-mentioned *Erbenlaub* had to be respected.[25] This paper will return to that further on. Another group of dispositions collects the so called:

b. Mutual postmortal dispositions, especially among spouses[26]

Donations or grants were often promised (and given) mutually, *i.e*. reciprocally. Very often they comprehended 'all goods' or a certain share of such. A formulation which one encounters regularly in practice was 'all goods he/she has now and would ever have (or acquire)'.[27] Spouses did often favour each other reciprocally. And in

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21 J. PÄTZOLD, *Leipziger gelehrte Schöffenspruchsammlung*, nos. 164, 165, 166, 169 and 170 – all of which were sentences by the bench.

22 *Ibidem*, nos. 164, 1286, 1288. The validity of such donations is confirmed in C. 3,36,4 and Ssp. Ldr. I,10.

23 *Ibidem*, nos. 1288, 1289.

24 *Ibidem*, no. 165.

25 J. PÄTZOLD, *Leipziger gelehrte Schöffenspruchsammlung*, nos. 165 and 166.

26 *Ibidem*, nos. 24, 167, 168, 176, 177, 178, 179 and 180.

27 See the many findings of such provisions in K. FOKT, C. SPEER and M. MIKUŁA (*eds*.), *Liber Vetustissimus Gorlicensis*; U. MÜSSIG, "Verfügungen von Todes wegen in den hallischen Schöffenbüchern" ["Acts of Last Will in the Jurymen's Books of Halle"], in: H. LÜCK (*ed*.), *Halle im Licht und Schatten Magdeburgs. Eine Rechtsmetropole im Mittelalter* [*Halle in the Light and Shadow of Magdeburg. A Legal Metropolis in the Middle Ages*], Halle, 2012, p. 130-150; IDEM, "Verfügungen von Todes wegen in mittelalterlichen Rechts- und Schöffenbüchern" ["Acts of Last Will in Medieval Legal and Jurymen's Books"], in: I. CZEGUHN (*ed*.), *Recht im Wandel – Wandel des Rechts. Festschrift für Jürgen*

many cases they added the condition that the disposition should become irrefutable and enforceable once the grantee survived the grantor. These were (and are) situations that could be seen juridically as contractual ones. However concerning the latter the author has shown previously that the term *Erbvertrag* (or 'testamentary contract') does have modern implications and could and should be avoided by a more open concept.[28] That is why the term 'mutual postmortal disposition' is used here and hereafter.

Such dispositions are legal evergreens: Roman law prohibited them if the disposition was unilateral and unconditional,[29] but permitted them if they were reciprocal *donationes mortis causa*.[30] There was no special rule for mutual postmortal dispositions (especially between spouses) in Saxonian law and no general rules which prohibited them. Nevertheless, thousands of such dispositions are booked in court's and in urban registers ever since such registers exist. The Leipzig jurymen had to deal with them, too.

A good example is a vote by one of the jurymen who was obviously asked whether a spousal disposition should be considered void (Pätzold, no. 179). The case is easily to understand: groom and bride had promised to give their goods to one another under the condition that the beneficiary survived the grantor. The counselling juryman declared that such a disposition was hardly to be foiled by law: *donationes mortis causa* were accepted by both Roman and Saxonian law even though he declared that unconditional donations were void referring to *ius commune*. He wrote: '*Es hat mir aber nie gefallen, soviel die Eheleute belangt, den wir wissen, das die donationes inter virum et uxorem odiosae et regulariter prohibitae sunt*' ('Personally I never liked this insofar spouses are concerned, because we know that gifts between husband and wife were suspicious and regularly prohibited'). Nevertheless he knew that Saxonian law did not prohibit them; one had – in the counsellors' words – only to pay attention to the already mentioned *Erbenlaub*. Once the disposition would concern land inherited by the grantor from his or her grandparents the disposition had to be made personally in (the *res sita*-) court[31] and it would need the consent of his or her living heirs.[32] This is what is henceforth denominated as the 'inherited-goods-principle'. Moreover, if the grantor was a woman, she had to be represented in court by her guardian.[33]

Weitzel [*Law in Transition – Transition of Law. Festschrift for Jürgen Weitzel*], Cologne, Vienna, 2014, p. 167-203; A. Schmidt-Recla, *Kalte oder warme Hand*, p. 113, 491, 509, 525, 539, 574, 593.

28 Cf. A. Schmidt-Recla, *Kalte oder warme Hand*, p. 2, 53, 73, 76-80.

29 D. 24,1,3, *Haec ratio*.

30 D. 24,1,9, *Si eum*; D. 24,1,10, *Quia*; and D. 24,1,11,1, *Sed quod*.

31 Cf. J. Pätzold, *Leipziger gelehrte Schöffenspruchsammlung*, nos. 184 and 1123.

32 Cf. *Ibidem*, nos. 181, 186. Otherwise the disposition would be valid only according to land acquired by the donor (for instance in a previous marriage).

33 K. A. Eckhardt (*ed.*), *Das Landrecht des Sachsenspiegels*, Erstes Buch, Artikel 46: '*Maget unde wif moten vormunde hebben an iewelker klage, dorch dat men se nicht vertugen ne mach, des se*

Another case (Pätzold, no. 180) went a step further: As reciprocal promises by grooms and brides, as well as by wives and husbands, were usually unconditional, the conditional character of donations had to be proven explicitly in every single case. This technical rule of evidence, however, does not contradict the view that (future) spouses had a fundamental freedom to dispose of their patrimony.

Such findings can be turned into conclusions. It is presumable that the jurymen knew and applied both laws (*ius commune* and *ius proprium*) and found a reasonable result on the basis of an academic, methodological approach. Thus, they found a proper balance between individual freedom and protection of *ab intestato* heirs. Furthermore, no. 180 shows that there was dissent among the jurymen on the earlier mentioned question on inherited goods. This *consilium* stated that consent of living heirs was non-essential even if the disposition concerned inherited land as long as the disposition did not derogate or narrow the *legitima* of the heirs. The counsellor justified this by citing D. 39.6.2, *Iulianus*.[34] This proves a major dissent – finally a challenge for the legislator who with the KSK[35] clearly opted against this Leipzig vote and opted instead in favour of the Sachsenspiegel's *Erbenlaub*. No. 185 then points out that the brother of the donor was not entitled to give consent according to the *Erbenlaub*. Consequently he had no chance to challenge, or, in other words, siblings or other relatives did not have the heir's right to consent and were not

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vor gerichte spreket oder dut'; Maiden and wife need to have a guardian with every claim, for that one cannot bear witness over them. Cf. J. PÄTZOLD, *Leipziger gelehrte Schöffenspruchsammlung*, no. 188.

[34] *Ibidem*, no. 188 follows this opinion too.

[35] *Kursächsische Konstitutionen*, part 2, c. 12: '*Das der zwey vnd funfftzigst Artickel im ersten buch des Landrechtens von vorgebunge der Stamgüter so one der Erben laub nicht geschehen soll, allein auff die schlechten Donationes zuuorstehen. Weil dieser Text saget, das one der Erben laub keiner sein eigen (das ist wie es gemeiniglich vorstanden wird Erbstamgüter) vorgeben könne, So ist zuwissen, das stamgüter solche güter seind, welche der Donator nicht selbst acquirirt oder erlanget, sondern die von seinen vorfaren als Grosuater vnd dergleichen gewonnen vnd von denselbigen jren vrsprung haben. Zum andern ist ferner darauff wol achtung zu haben, das der Text redet von vergebung der güter. Derowegen sol vnserer Verordenten bedencken nach auch das wort Erben nicht auff alle Erben, sondern allein auff die descendentes zu restringiren sein. Wie dann eben aus diesen vrsachen das SachsenRecht, so von vnbeweglichen gütern redet, auff die beweglichen nicht zuerstrecken. Es sol aber gleichwol auch in denen fellen, do die verenderung der stamgüter nicht verbotten, dieselbige billich in fraudem legitimæ nicht zuleslich sein. So sol gleicher gestalt auch die vbergabe der stamgüter, wann gleich dieselben mit der Erbenlaub vnd also licitè geschehen, zu recht nicht bestehen in dem fal, do sie vbermessig vnd sich vber fünff hundert gülden vngerisch erstreckte, sie were dann von erst gebürlichen insinuiret. Vnd alle abgesatzte felle sollen allein stat haben in donatione simplici inter uiuos. Vnd das jnen frey stehe, sonsten solcher güter halben testamenta vnd andere bestendige letzte willen auffzurichten, Welchen auch stracks nachzusetzen. Item vnd sonderlich, das ein jeder macht habe, solche güter einem seiner Kinder für dem andern etiam donatione inter uiuos, iedoch salua legitima, zu zuwenden. Darbey wir es auch allenthalben bleiben lassen vnd sollen vnsere Iuristen Facultete vnd Schöppenstüle darnach also sprechen vnd erkennen.*' K. A. ECKHARDT (*ed.*), *Das Landrecht des Sachsenspiegels*, Erstes Buch, Artikel 52, S. 1 should be held in power when the goods were inherited from the grandfather's line. Heirs whose consent was necessary were descending heirs only and this should apply to immobile goods only. The legitimate portion then was not to be subtracted. Postmortal dispositions of such inherited goods should be held valid and enforceable.

entitled neither to challenge nor to dispute the contractual disposition (after the death of one of the spouses).[36] Moreover, a person who wanted to challenge had to adhere to the (Saxonian) term of year and day.[37]

In a case from April 1561 (Pätzold, no. 192) two jurymen (both professors of the Leipzig School of Law) called the two mutual dispositions 'testaments'. Hereby they found that the surviving spouse was free to change his or her disposition after the death of the other – not in full but with regard to their part. In their allegation they referred to the principle: '*tot sunt testamenta, quot personae testamentum facientes*'. Obviously this argument trenched any possible contractual bindings between the disposing spouses. For this conclusion they could not find any allegation in Saxonian law; it is therefore worth looking to the third group: decisions concerning testaments.

c. Testaments

Unilateral last wills – testaments – are not mentioned in special provisions of medieval Saxonian law. Legal practice proves that people used to dispose postmortally this way. The designation of an heir (*caput et fundamentum testamenti* according to Gaius) was not necessary, but became common in Saxony in the sixteenth century too. Representationally, they differ from the above-mentioned (cf. 3.a.) donations by the fact that they comprehended all goods (*omnia bona*) or a rate or share of such. According to the 'inherited goods'-principle, the heir's consent had to be observed in unilateral dispositions, too.[38]

Of special interest concerning *ius commune* is which legal formalities the jurymen demanded for unilateral last wills. Classical Roman law demanded the presence of five attestors, a public official and the so called *familiae emptor*; Justinianic law then (Inst. 2,10,14, *Sed haec*) demanded seven attestors. No. 226 of our compilation shows that the jury knew the Roman formalities by stating that six attestors and a public official were necessary. They had to declare by oath that the testator had disposed as asserted by the claimant. Nos. 225, 228, and 1286 confirm the seven witnesses-rule and no. 229 declares that a disposition in presence of two noblemen only was invalid – unless warlike combat prevented the testator from proper formalities. This argument (need or emergency) seems to have opened the range for the jury to combine Roman formalities and daily practice. A perfect example is no. 223, a vote addressed in 1555 to a tax officer in Zwickau. A farmer had disposed in the presence of the (probably Protestant) pastor and two attestors that his wife should receive 100 Thalers from his goods once she survived him. He then had been

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36 J. PÄTZOLD, *Leipziger gelehrte Schöffenspruchsammlung*, no. 190 does confirm that clearly.

37 *Ibidem*, no. 1122. Saxonian means that '*Jahr und Tag*' was measured according to the *Sachsenspiegel*, *i.e.* one year, six weeks and three days.

38 *Ibidem*, no. 227.

close to death – the pastor had already been administering the sacrament to him. The jurymen decided that this disposition was firm and valid, the farmer's brothers and sisters were not entitled to dispute the disposition.[39] Furthermore the vote uses the term 'testament' for the farmer's decree although there was no designation of an heir in it. At the end of the vote the jurymen added a leading record in Latin: '*Omne testamentum in terris subiectis ecclesiae, licet ad pias causas, factum a parochianis in praesentia praesbyteri et duorum testium, valet et tenet*'. The case does not prove that the farmer disposed *ad piam causam*, the disposition was not made in favour of an ecclesiastical institution. But most probably the farmer was one of the parishioners the priest was responsible for and the estate was in the since 1531 completely Protestant Zwickau community part of the '*terrae subiectae Ecclesiae*'.[40] The term 'testament' was thus and then open to any unilateral disposition, if it did not contain any designation of an heir.

Such testaments did not need to be made in writing. Casually one can learn what the jurymen demanded of the testator in respect of his capabilities: he had to be of good reason;[41] the vote did not mention physical power. The horseman's proof[42] was, nonetheless, not forgotten: no. 1119 from 1555[43] and no. 1120 from 1598[44] give perfect examples of fully completed horseman's proofs.

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39 *Ibidem*, no. 223. '*Wolff Behemb schössern zu Zwickaw. Hat ein alter bauersman, davon euer frage meldet, fur dem herrn pfarhern, der ihme das sacrament gereicht, in beysein und angehör zweyer oder mehr gezeugen mit gutter vernunfft sein testament geschlossen, darinnen seinem weibe 100 R. ubern dritten theil so ihr sonst gebuhret, seinen guttern geschafft und bescheiden, und ist darauf ohne leibeserben verstorben, so ist solcher sein lezter wille im rechten bestendigk, und seine brüder und schwestern haben denselbigen nicht fugk anzufechten, ungeachtet ob sie von der ubermaß der gutter wenigk oder auch nicht bekommen. VRW. Omne testamentum in terris subiectis ecclesiae, licet ad pias causas, factum a parochianis in praesentia praesbyteri et duorum testium, valet et tenet* (X. 3.26.10, *Cum esses*)'.

40 Zwickau was one of the leading communities during the Reformation; the total episcopate was finally and completely established here 1531.

41 *Ibidem*, no. 223, see above note 31 '*mit gutter vernunfft*'.

42 K. A. ECKHARDT (*ed.*), *Das Landrecht des Sachsenspiegels*, Erstes Buch, Artikel 52, S. 2: '*Alle varende have gift de man ane erven gelof in allen steden, unde let unde liet gut, al de wile he sek so vermach, dat he, begort mit eneme swerde unde mit eneme scilde, op en ors komen mach, van eneme stene oder stocke, ener dumelnen ho, sunder mannes hulpe, deste men eme dat ors unde den stegerep halde; swen he disses nicht dun ne mach, so ne mach he geven noch laten noch lien, dat he it jeneme untverne, de is na sineme dode wardende is.*'

43 J. PÄTZOLD, *Leipziger gelehrte Schöffenspruchsammlung*, no. 1119: '*Referatur scabini Hanßen Volmarck uf Marienberg. Concepit D. Modestinus sententiam ex consilio D. Losselii. Der sein guth nach sechsischen rechten vergeben wiel, undter dem adell muß also geschehen, erstlich das er der macht, das er ohne menschliche hulffe uf ein pferdt, habende einen schilt seiner brust hengen undt mit einem schwertte gegürttet (doch mag er uf einen stein oder stock eines elbogen hoch treten undt das man ihme das pferd halte) springe: Landr. lib. 1, art. 52. Ein pawer, das er ein gewende weeges dem pfluge nachgehen möge (V.R.W.).*'

44 *Ibidem*, no. 1120: '*Oberhofgericht Leipzig. Zu vormercken, das uf heute, sonnabendt nach Sancti Matthei Apostoli anno nonagesimo octavo, ist Georg von der Gaberlenz der elter in der macht undt crafft, das er am ersten mit einem schwertte gegurtt und mit einem schielde in stieffeln undt sporen ohne menniglichs hulffe auf ein pferdt gesprungen undt der stegereiff nicht gerürtt undt darnach*

In a counsel (Pätzold, no. 1284) the famous Saxonian learned lawyer Ludwig Fachs (1497-1554)[45] acknowledges that any disposition before court and with two attestors was '*crefftig und bestendig, wenn gleich nur zween gezeugen darin geschrieben wehren*' ('valid and lasting, even when only two witnesses were recorded in it').[46] Very often these dispositions were booked into public or court's registers. They could be announced in the presence of six attestors and an official, or – more practical – to two attestors and the court, or – even more practical – to two attestors and a cleric (in Protestant counties and in most cases for the rural population in smaller parishes the best and only official available). In one case (Pätzold, no. 233) the jurymen demanded a special formality as the testator was blind, following C. 6,23,21, *Hac consultissima*. In that case seven attestors had to sign and seal the written document and a public notary had to do likewise. If done like this neither Saxonian nor Roman law would interfere with it. Moreover, the jury decided in 1537 that the testator was free to compile single dispositions within one new act, even in the absence of witnesses, as long as he kept the original document until his death.[47]

Another question was whether a father was free to designate his natural, illegitimate son as his testamentary heir. The counsellor voted that he was – due to the fact that Saxonian law did not have a provision which prohibited such dispositions even in favour of spurious children.[48] The counsellor argued that Saxonian law left that question to *ius commune*. There he found the rule that the father was free to do so if he had no legitimate child. Needless to say that the *querela inofficiosi testamenti* could successfully be filed in these cases too.[49]

4. Conclusions

The reception of *ius commune* may have led Saxonian legal experts through slippery lanes – but they did not slip. On the contrary, they upheld some guidelines.

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auch wieder abgeseßen, undt sich alßo in maßen, sich nach vorordnunge sächsischer rechte einem rittermeßigen manne zu thun gebühret, beweist undt erzeiget, vor hofferichter undt beysizern, die das gesehen, kommen undt allda den erbarn Heinrichen und Georgen, seinen vattern, von der Gabelenz gebrüdern in der allerbesten form, weise undt maß, als solches zu rechte geschehen soll, kan undt magk, ubergeben und geeignet alle undt iezliche stucke, so zu erbe und erbrechte gehören, welche ihme zustendg und angehörig, sich darauf mit uberreichung der schlüßel an solchen stücken undt fahrender haabe aller der gewehr geeußert undt vorziehen, Datur.'

45 Fachs was member and ordinarius of the Leipzig School of Law, alderman and mayor of Leipzig, juryman and chancellor of the duke of Saxony, August I's elder brother Moritz (1521-1553), who was then not (yet) elector but duke of Saxony.

46 *Ibidem*, no. 1284.

47 *Ibidem*, no. 232.

48 *Ibidem*, no. 1284.

49 *Ibidem*, no. 316.

a. Six *Schöppenstuhl* guidelines

First: All kinds and forms of last wills were accepted – single postmortal donations, testamentary contracts, unilateral testaments. Individual freedom to dispose postmortally was not blocked by any clannish bindings from (mythical Aryan, German or) Saxonian root. Tradition hence was not an *a priori* legal principle for the jury. Second: As far as content is concerned the designation of an heir as a Roman law requirement was known (the jurymen were in fact learned jurists). They probably knew that Roman law hence effectuated that the bequeather in persona was replaced by the heir once he died. But this principle was far from being the matrix for their votes. Much more dispositions they had to deal with did not contain a designation of an heir but were related to specific goods instead. They mobilized fortune and means (movable and immovable). Thus inheritance was not a matter of replacing and/or representing a person but a matter of transferring goods. Anyway, the *Schöppenstuhl* counsellors and jurymen did not hesitate to acknowledge dispositions of this kind. Such dispositions were however denominated as *testamenta* – learned law cannot have been the reason for this denomination. Third: Concerning the number of attestors, the *Schöppenstuhl* seemed to uphold the Roman legal requirement of seven, even if, on the other hand, the jurymen were open to practical solutions (an official and two witnesses). This was the minimum that was acceptable. Such rules are (probably anytime) provided in favour of publicity. Fourth: All dispositions were seen under the (medieval) Saxonian rule of the inherited goods-principle. Dispositions concerning land had to be fixed before court and with heir's consent (*Erbenlaub*) only. The *Schöppenstuhl* stuck to this special character of Saxonian law given by the *Sachsenspiegel*. Fifth: All dispositions were considered under the *ius commune*-rule of the legitimate portion. Sixth: The *Schöppenstuhl* organized the principles 4 and 5 technically as objections. A person disadvantaged by the disposition had to plea for it afterwards within the term of year and day (in Saxonian measure). Without an action in rescission the *Schöppenstuhl* considered the disposition as enforceable.

b. And the 'law in the books'?

It is not surprising to notice that these six guidelines did rule the normative framework of the KSK from 1572 on, too. The inherited goods-principle was put into words in the KSK[50]. The publicity-rule was expressed in the third part of the KSK.[51]

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50 See above, note 36.

51 *Kursächsische Konstitutionen*, part 3, c. 3: '*Wann ein Testament vor Gericht oder vor Personen, so von Gerichtswegen darzu beruffen, auffgericht, Ob zu demselbigen auch andere Zeugen erfordert werden müssen. VNgeachtet das etzliche bey den Testamenten, so gerichtlich geschehen, Zeugen erfordern, So seind doch vnsere Vorordente dessen einig, das dieselbige zu recht bestendig, ob gleich keine andere zeugen darinnen benant, oder dazu gebeten worden. Wo auch Gerichtspersonen von Gerichtswegen zu einem der do kranck ist, in seine behausunge auff sein erforderunge geschickt,*

This provision, concerning holographic testaments, stated that, in principle, testaments had to be made before the court, although it was also possible to write them in private and deposit them in court afterwards. Such postmortal dispositions then would not require witnesses or attestors at all ('*da gleich keine Zeugen dabey sein*'); the intervention of the court was estimated to provide sufficient publicity.

In III,4 KSK[52] the legislator was addressing the number of testamentary witnesses in times of trouble (such as pestilence) when the bequeather had no chance to come to court. The provision acknowledged two witnesses as a minimum – but no court or any official at all. It is clear that the *Schöppenstuhl* had prepared the soil for this rule.

In III,5 KSK[53] August I and his counsellors ruled that dispositions made by ill persons on their deathbed had to be considered valid if the disposing person was able to speak understandably, was aware that he or she was disposing postmortally, and was disposing non-contentiously and not coerced by those around him or her in the final hour.

Last but not least the *legitima*-principle got its expression in early modern Saxonian law in III,7[54] KSK, which stated that husbands were not allowed to take away their wife's (and future widow's) third or quarter (once such a third or quarter

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vnd er vor jnen sein Testament macht, so wird es dauor gehalten, als were es coram actis, vnd vor Gerichte geschehen. Also auch, wo einer ein Testament doheim schreibet, oder schreiben lesset, vnd leget das selbige hinder das Gerichte, so ist es krefftig, da gleich keine Zeugen dabey sein. Darnach sich vnsere Hoffgerichte IuristenFaculteten, vnd Schöppenstüle in Rechtssprechen zu richten haben sollen.'

52 *Kursächsische Konstitutionen*, part 3, c. 4: '*Vor wieuiel Zeugen ein Testament so zur zeit der Pestilentz, oder in sterbensleufften gemacht worden, krefftig sein kan. DIeweil vnsere Vorordente aus erheblichen vnd rechtmessigen vrsachen vor billich erachten, wann einer so an der Pestilentz ligt oder in dessen behausunge solche seuche regiret, ein Testament vor drey oder zweien glaubwirdigen Zeugen gemacht, das solch Testament, so viel die solemnitet der zeugen anlanget, zu recht vor bestendig zuerkennen. So lassen wir es auch dabey bleiben vnd sol in vnsern Landen darnach also erkand vnd gesprochen werden.*'

53 *Kursächsische Konstitutionen*, part 3, c. 5: '*Welcher gestald ein Testament, so auff dem todbette von einem der sehr schwach ist gemacht worden, vor bestendig vnd krefftig zuerkennen sey (et)c. Wann ein solch Testament bestendiger weise geschehen sol, so ist es nicht gnug, das es seiner solemnitet vnd herrligkeit halben bestehe, Sondern es müssen auch dreyerley stück dabey sein. Erstlich, das der Testator articulatè vnd vorstendiglich reden könne. Zum andern, das er des willens vnd der meinung sey, das er sein Testament machen wölle, welches daraus abzunemen, wann er den Notarium, oder einen andern derowegen zu sich gefordert vnd gebeten, das derselbige solches sein vornemen, den Zeugen vortragen vnd anzeigen sol. Zum dritten, das keine præsumption vnd vermutung vorhanden, doraus abzunemen, das der Testator schwacheit halben sein Testament nicht freywillig, sondern denen zugefallen vorordenet, so bey jme seind, durch welche er mit harten worten oder vngestümmen anhalten zu testiren gebracht worden. Darauff dann in vnsern Landen geurteilt vnd gesprochen werden sol.*'

54 *Kursächsische Konstitutionen*, part 3, c. 7: '*Ob der Man dem Weibe oder das Weib dem Man durch auffrichtunge eines Testaments das jenige was dem vberlebenden Ehegaten aus des vorstorbenen gütern gebüret entwenden vnd vormindern könne. ES wird von den RechtsLehrern in gemein gehalten, das der Man nicht befugt sey, dem Weibe den dritten oder vierdten teil oder anders, so jr nach seinem absterben vormüge einer wilkür oder wol hergebrachten gewonheit aus des Mannes gütern gebüret, gar oder zum teil zu entwenden. Wie dann auch gleicher gestalt hinwiderumb dem Weibe nicht nachgelassen wird, das jenige, was dem vberlebenden Ehemanne aus jren gütern zu stehet, durch ein*

was as *legitima* foreseen in a local or statutory custom: '*vormüge einer wilkür oder wol hergebrachten gewonheit*'). The same was forbidden for wives as well.

These provisions were in force in Saxony until the nineteenth century. The inherited goods-principle was used by the *Reichsgericht* as late as 1932.[55] The Elector of Saxony and his learned counsellors had decided to choose the certainty of a merging and newly written law and thus preserved some medieval legal thought for centuries to come.

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Testament oder andern letzten willen zuuormindern. Derowegen wollen wir, wann sich solche felle zutragen, das hierauff also in vnsern Landen zu Recht erkant vnd gesprochen werde.'

[55] *Entscheidungen des Reichsgerichts in Zivilsachen* [*Decisions of the Imperial Court in Civil Cases*] 137 (1932), p. 324-355, 343 f.: The heir's consent was there designated to have been the 'legitimate basis for a revocatory claim *in rem*'.

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MÜSSIG, U., "Verfügungen von Todes wegen in mittelalterlichen Rechts- und Schöffenbüchern" ["Acts of Last Will in Medieval Legal and Jurymen's Books"], in: I. CZEGUHN (*ed.*), *Recht im Wandel – Wandel des Rechts. Festschrift für Jürgen Weitzel* [*Law in Transition – Transition of Law. Festschrift for Jürgen Weitzel*], Cologne, Vienna, 2014, p. 167-203.

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TESTAMENTARY FREEDOM IN SIXTEENTH-CENTURY BOHEMIAN LAW

Marek STARÝ

Abstract – Testamentary freedom can be considered one of the most important institutes of modern inheritance law, while its roots must be sought deep in Antiquity (of course, Roman law in particular must be taken into account). The aim of the present study is to deal with the scope of this freedom in early modern Bohemian law, which showed continuity with the Roman law tradition, but was partly based on the domestic legal tradition and other external influences. It is obvious that this freedom could not be unlimited (as it still is not in current law either). Thus, the issues of personal capacity, necessary for the ability to freely decide on the property mortis causa, the limitations resulting from the nature of the property owned or held by the testator, family relationships, usually implying the obligation to leave at least part of the property to the closest blood relatives, and the hierarchical structure of early modern society, where many property acts required the approval of a higher authority to be valid, are gradually discussed. The result is a comprehensive, if perhaps somewhat complicated, overview, useful for further comparative study.

1. Introduction

The early modern law applicable in the territory of the Bohemian Crown was complex and highly fragmented. This was primarily true geographically, as every land that was included in this complex during the Middle Ages maintained its legal autonomy. Equally important, however, was the fact that within each land, several legal systems were *de facto* in competition, each applying to a certain segment of the population (nobility, bourgeoisie, serfs, clergy). Moreover, within these systems, certain subsystems could also operate. Thus, for example, the law applicable in the various towns differed considerably, with the northern part of the Crown being fundamentally influenced by Magdeburg law, while the southern part was based on Swabian law, but creatively modified over time.

This brief and somewhat simplified statement already indicates quite clearly that an understanding of any legal institution and its functioning at this time requires a simultaneous examination of several normative arrangements. And given that the

goal of the legal historian cannot only be to learn about law in books but that he must also deal with the level of law in action, such an investigation also presupposes acquaintance with a wide range of contemporary sources of various kinds and provenance.

The aim of this paper is to focus on the question of testamentary freedom in Czech (Bohemian) law in the sixteenth century. For reasons of feasibility, the primary focus will be on the law of the Bohemian Kingdom, *i.e.* the situation in the other countries of the Bohemian Crown (the Moravian Margraviate, the Silesian Principalities, the Margraviate of Upper and Lower Lusatia) will be left aside. These will be occasionally referred to briefly for comparative reasons.

The examination of testamentary freedom will be primarily pursued through the lens of what may have restricted this freedom. These limitations will be viewed from a legal-historical perspective – the application of a historical-social, historical-cultural or historical-anthropological approach would open up other, complicated levels of the issue. But while in these one can get 'only' the factual limitations of testamentary freedom mediated by social pressure, the legal-historical analysis is meant to show what were the 'legal' and therefore unbreakable limits of free bequest.

These limits can be broadly divided into four types, which will be addressed in turn:

1. Some persons were not personally eligible to make a last will.
2. A last will could not be used in relation to certain types of property.
3. A last will needed to respect certain substantive limits which restricted the testator's freedom.
4. The possibility of making a last will was subject to the permission of a higher authority.

As far as the sources are concerned, the land law (which obligated especially the nobility) was already codified in Bohemia in the sixteenth century in the so-called Land Constitution. The first of these was the so-called Vladislav Land Constitution, adopted in 1500 against the will of the towns and initially without the (obligatory) King's sanction.[1] The constitution was supplemented rather than replaced by another statute issued in 1530 after the accession of Ferdinand I of Habsburg to the Bohemian throne. In 1549, the same monarch initiated the publication of another code, which took over many of the older norms, but at the same time introduced certain modifications and, among other things, somewhat strengthened the monarch's power. This new, comprehensive code was then reissued in 1564, but the new version was more of a systematic innovation, in which various sections and articles

[1] An excellent modern edition of this code is P. KREUZ and I. MARTINOVSKÝ (*eds.*), *Vladislavské zřízení zemské a navazující prameny (Svatováclavská smlouva a Zřízení o ručnicích). Edice* [*Vladislav Land Constitution and Related Sources (St. Wenceslas Treaty and Constitution about Rifles). Edition*], Prague, 2007. The extensive introductory study describes the process of its creation in detail and includes references to rich older literature.

were moved around, but the variations in content were minimal. More than anything else, it was thus a new revision of the 1549 constitution. Formally, however, it was the publication of a new constitution.[2] Attempts at further recodification, which had been under way for many decades and had resulted in the drafting of a new code at the beginning of the seventeenth century, were no longer successful.[3]

It should be added that the provisions of the land constitutions, however, deal only minimally with the issue of testamentary succession. Thus, in the first code of 1500, the testament (under the Czech term *kšaft*) appears in only 11 out of 576 articles. The authors of the approved draft did not even attempt to provide a comprehensive (albeit brief) treatment of the issue, but only touched on it in a haphazard and casuistic manner. Nor are the other sixteenth-century codes much more detailed. And the situation in Moravia was very similar. In the last pre-White Mountain code of 1604,[4] the legal regulation of making a last will was limited to only five articles, again very casuistic. Moreover, the last will and testament is here hidden behind the at first sight somewhat confusing term 'guardianship' (*poručenství*).[5] It was only the Renewed Land Constitution, issued for the Kingdom of Bohemia in 1627, that brought about a significant shift in this respect.[6] However, this happened in a new political and, in a way, legal constellation, and outside the time interval on which this study is focused.

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[2] The Bohemian Land Constitutions of 1530, 1549 and 1564 were edited by J. Jireček and H. Jireček (*eds*.), *Codex iuris Bohemici*, vol. 4, part 1, section 1. *Jura et constitutiones regni Bohemiae saeculi XVI*, Prague, 1882. The gradual transformation of land law in the sixteenth century was outlined, *e.g*., by J. Pánek, "Český stát a stavovská společnost na prahu novověku ve světle zemských zřízení" ["The Bohemian State and the Estates Society on the Threshold of the Modern Age in the Light of the Land Constitutions"], in: K. Malý and J. Pánek (*eds*.), *Vladislavské zřízení zemské a počátky ústavního zřízení v českých zemích (1500-1619)* [*Vladislav Land Constitution and the Beginnings of the Constitutional System in the Bohemian Lands*], Prague, 2001, p. 13-54, or J. Janišová and D. Janiš, *Moravská zemská zřízení a kodifikace zemského práva ve střední Evropě v 16. a na začátku 17. století* [*Moravian Land Constitutions and Codification of Land Law in Central Europe in the 16th and Early 17th Century*], Prague, 2016 (as the title of their work suggests, however, it focuses mainly on the Moravian conditions).

[3] J. Glücklich (*ed*.), *Nová redakce zemského zřízení království českého z posledních let před českým povstáním* [*New Edition of the Land Constitution of the Kingdom of Bohemia from the Last Years before the Bohemian Uprising*], Brno, 1936.

[4] The Battle of the White Mountain (8 November 1620), in which the army of Emperor Ferdinand II decisively defeated the troops of the rebellious Bohemian evangelical estates, who had deposed Ferdinand a year earlier and elected the Elector Frederick of the Palatinate as their king, represents a major turning point in the political and legal history of the Bohemian state. As the victor, Ferdinand was able to significantly consolidate the power of the ruler, which was also reflected in the so-called Renewed Land Constitution in 1627.

[5] A remarkably successful and careful edition of this code is J. Janišová (*ed*.), *Zřízení zemské Markrabství moravského z roku 1604* [*Land Constitution of the Margraviate of Moravia from the year 1604*], Prague, 2015. A content analysis of Moravian land law in a broader chronological framework is the follow-up publication J. Janišová and D. Janiš, *Komentář k moravským zemským zřízením z let 1516-1604* [*Commentary to the Moravian Land Constitutions of 1516-1604*], Prague, 2017.

[6] H. Jireček (*ed*.), *Obnovené právo a zřízení zemské dědičného království Českého. Verneuerte Landes-Ordnung des Erb-Königreichs Böhmen 1627* [*Renewed Law and Constitution of the Hereditary Kingdom of Bohemia 1627*], Prague, 1888. A separate section is devoted to testamentary succession, including articles O 1 – O 28.

The real shape of aristocratic testamentary practice can be seen in a published set of 101 wills, accompanied by a solid introductory study.[7] However, there is no disputing that these wills (or the codicils attached to them) represent only a small proportion of not only the written but also the extant last wills. These can be found in various archival files and fonds, but the key ones are undoubtedly the Land Tables, into which their text was transcribed as standard.[8] Perhaps even more important for the understanding of law in action are the disputes that were fought before the Superior Land Court of the Bohemian kingdom at this time regarding the validity of individual wills or their specific provisions. Information on them can also be found mainly in the Land Tables. However, knowledge of these disputes is at best at the very beginning.

In the case of municipal law, as has already been mentioned, in the period under review, two areas of law must be taken into account. The southern one, which in Bohemia can most probably be called the Old Town law (the earlier ideas leading to calling the norms in force there 'Nuremberg law' have probably been definitively overcome[9]), and the Magdeburg law, in which the town of Litoměřice played a key role. It also retained, despite repeated prohibitions by the Bohemian kings, a relatively strong link with Magdeburg as a supreme legal authority until the sixteenth century.

Although Magdeburg law was distinctly conservative in nature, it certainly cannot be imagined that it was applied in any archaic and unchanging form in the towns that were based on it. On the contrary, especially in Litoměřice, there was a gradual creative addition and modification of the originally adopted law. Contrary to earlier ideas, it is now accepted that the original Sachsenspiegel was used there only to a very limited extent, or rather indirectly, when some of its norms were adopted into local, distinctive sources.[10] Of these, mention should be made in

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7 P. Král, *Mezi životem a smrtí. Testamenty české šlechty v letech 1550-1650* [*Between Life and Death. Testaments of the Bohemian Nobility in the Years 1550-1650*], České Budějovice, 2002.

8 Prague, Národní archiv [National Archives], fond Desky zemské [Land Tables], sign. DZV 1-DZV 27, DZV 127-139.

9 See *e.g.* J. Kejř, *Vznik městského zřízení v českých zemích* [*The Establishment of the Municipal System in the Bohemian Lands*], Prague, 1998, briefly Idem, "Das böhmische Städtewesen und das 'Nürnberger Recht'" ["The Bohemian Municipalities and 'Nuremberg Law'"], in: *Der weite Blick des Historikers: Einsichten in Kultur-, Landes- und Statgeschichte. Peter Johanek zum 65. Geburtstag* [*The Wide View of the Historian: Insights into Cultural, National and State History. Peter Johanek on his 65th Birthday*], Cologne, 2002, p. 113-124.

10 In detail *e.g.* H. Lück, "Rechtstransfer und Rechtsverwandschaft. Zum Einfluss des magdeburger Stadtrechts im Königreich Böhmen" ["Legal Transfer and Legal Kinship. On the Influence of Magdeburg's Municipal Law in the Kingdom of Bohemia"], in: K. Malý and J. Šouša (*eds.*), *Městské právo ve střední Evropě* [*Municipal Law in Central Europe*], Prague, 2013, p. 298-317, K. Gönczi, "Analyse der Rechtstransfers" ["Analysis of the Transfer of Law"], in: I. Bily *et al.* (*eds.*), *Sächsisch-magdeburgisches Recht in Tschechien und in der Slowakei. Untersuchungen zur Geschichte des Rechts und seiner Sprache* [*Saxon-Magdeburg Law in Bohemia and Slovakia. Research on the History of Law and its Language*], Berlin, Boston, 2021, p. 11-48, briefly also V. Spáčil and L. Spáčilová, *České překlady Míšeňské právní knihy* [*Czech Translations of the Meissen Law Book*], Olomouc, 2018, p. 20.

particular of the Litoměřice town book (*Liber civitatis Litomericensis*) from 1341-1562, containing a number of town statutes and regulations,[11] and the so-called Saxon Laws (*Das sächsische Stadtrecht*), a private writing (also of Litoměřice provenance) from 1469-1470.[12] In the context of the initiative to unify the municipal law in the whole Bohemia, Litoměřice prepared and in 1571 submitted to emperor Maximilian II the so-called *Extrakt* ('Extract of the main and most important articles of the Saxon or Magdeburg laws'), which was to prove the development of the Magdeburg law and its legal quality when compared with the Old Town Law.[13]

It was the Old Town 'legal area' that repeatedly gave rise to the impulses for the unification of municipal law throughout the Bohemian Kingdom. This is quite understandable given the apparent leading role of the Old and New Towns of Prague within the Bohemian towns´ estate. For a number of reasons, however, it proved impenetrable for this unification to take the form of a classical legislative act (as it did in the land law), and so the prospect was for a private writing to gain general recognition and eventually receive legal sanction. The first attempt, the book 'The Municipal Laws', authored by Brikcí of Licsko and published in 1536,[14] did not succeed in this respect. However, it undoubtedly had a significant impact on real judicial practice. It was not until the next work, whose main author is undoubtedly rightly considered to be the Old Town Chancellor and former Dean of the Faculty of Arts at Charles University, Pavel Kristián of Koldín, that it was successful. That is why it is generally known under the abbreviated name of Koldín, or – inaccurately – Koldín's Code.[15]

The book 'The Municipal Laws of the Kingdom of Bohemia' was issued in the summer of 1579 on the basis of the previous Land Diet's permission and immediately became binding for all towns of the Old Town district. Litoměřice and the remaining towns of the Magdeburg area were subject to it only since 1610.[16]

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[11] Edited by B. Kocánová *et al*. (*eds*.), *Libri civitatis III. Městská kniha Litoměřic (1341) – 1562 v kontextu písemností městské kanceláře* [*Litoměřice Town Book (1341) – 1562 in the Context of the Documents of the Town Chancery*], Ústí nad Labem, 2006.

[12] It is a private writing of Litoměřice law, stored in the Parliamentary Library and accessible at www.psp.cz/sqw/hp.sqw?k=2038, accessed 28 February 2023.

[13] The extract was published simultaneously with the accompanying notes of the representatives of Old Town of Prague, to whom the emperor sent the material for comment ("Comparison of the Laws of Prague with those of Magdeburg"), in the publication H. Jireček (*ed*.), *Spisy právnické o právu českém v XVI-tém století* [*Legal Writings on Bohemian Law in the 16th Century*], Vienna, 1883, p. 98-147.

[14] J. Jireček and H. Jireček (*eds*.), *M. Brikcího z Licka Práva městská* [*M. Brikcí of Licsko's Municipal Laws*], Prague, 1880.

[15] This work was also originally made available by J. Jireček (*ed*.), *Codex iuris Bohemici*, vol. 4, part 3, section 2. *Mag. Pauli Christiani a Koldín Jus municipale regni Bohemiae*, Prague, 1876. A new edition has been published by K. Malý *et al*. (*eds*.), *Práva městská Království českého. Edice s komentářem* [*The Municipal Laws of the Kingdom of Bohemia. Edition with Commentary*], Prague, 2013.

[16] In more detail P. Slavíčková, "Recepce Práv městských Království českého ve městech sasko-magdeburského práva v Čechách a na Moravě" ["Reception of The Municipal Laws of the Bohemian Kingdom in the Towns of the Saxon-Magdeburg Law in Bohemia and Moravia"], in:

The majority of the population of the Kingdom of Bohemia lived in the countryside and was, in the period under review, subject to the jurisdiction of their manorial lords, whose share of public power included the ability to create legal norms with limited territorial validity.[17] However, there is no dispute that much of the legal relations in this environment were maintained in a customary form. Subsidiarily, municipal law was also applied here.

As far as the literature is concerned, it is not possible at this point to attempt a complete bibliographical survey. Therefore, only a few larger works should be mentioned, which can serve as a starting point for further, more detailed study. Land inheritance law in the medieval and early modern period was mainly elaborated by Rudolf Rauscher;[18] a more recent publication by Karolina Adamová and Antonín Sýkora offers a rather clear recapitulation.[19] As far as municipal law is concerned, first of all the synthetic work by Michaela Hrubá[20] and the collective monograph edited by Kateřina Jíšová and Eva Doležalová are worth mentioning.[21] The early modern form of inheritance law applicable to the serf population was dealt with in a somewhat underrated monograph by Vladimír Procházka.[22] In addition, a number of special studies have been published, some of which will be quoted in the following text.[23]

K. Malý and J. Šouša (*eds.*), *Městské právo ve střední Evropě* [*Municipal Law in Central Europe*], Prague, 2013, p. 83-94.

17 The extensive material of medieval and pre-White Mountain regulations relating to the serf population was collected by J. Kalousek (*ed.*), *Archiv český čili Staré písemné památky české i moravské sebrané z archivů domácích i cizích* [*Bohemian Archive i.e. Old Written Monuments of Bohemia and Moravia Collected from Domestic and Foreign Archives*], vol. 22, Prague, 1905.

18 R. Rauscher, *O zvolené posloupnosti v českém právu zemském* [*On the Chosen Succession in Bohemian Land Law*], Prague, 1921; Idem, *Dědické právo podle českého práva zemského* [*Inheritance Law According to Bohemian Land Law*], Bratislava, 1922.

19 K. Adamová and A. Sýkora, *Dědické zemské právo v české historii: K obsahu českého zemského hmotného dědického práva od patrimoniálního státu do poloviny 17. století se zvláštním zřetelem k Obnovenému zřízení zemskému, Deklaratoriím a Novelám* [*Land Inheritance Law in Czech history: On the Content of Czech Substantive Land Inheritance Law from the Patrimonial State to the Mid-17th Century, with Special Reference to the Renewed Land Constitution, Declarations and Amendments*], Ostrava, Brno, 2013.

20 M. Hrubá, *'Nedávej statku žádnému, dokud duše v těle'. Pozůstalostní praxe a agenda královských měst severozápadních Čech v předbělohorské době* [*'Give No Man a Possession while the Soul is in the Body.' Inheritance Practice and Agenda of the Royal Towns of Northwest Bohemia in the pre-White Mountain Period*], Ústí nad Labem, 2002.

21 K. Jíšová *et al.*, *Pozdně středověké testamenty v českých městech. Prameny, metodologie a formy využití* [*Late Medieval Testaments in Czech Towns. Sources, Methodology and Forms of Use*], Prague, 2006.

22 V. Procházka, *Česká poddanská nemovitost v pozemkových knihách 16. a 17. století* [*Bohemian Serf Property in Land Registers of the 16th and 17th Centuries*], Prague, 1963, p. 453-511.

23 References to some of them are included in the cited monographs. Numerous references are also provided in the study of V. Knoll, "Intestátní dědická posloupnost v českém středověkém právu zemském a městském" ["Intestate Succession in Bohemian Medieval Land and Municipal Law"], *Časopis pro právní vědu a praxi* [*Journal for Legal Science and Practice*] 3/20 (2012), p. 235-244.

2. Testamentary capacity

The issue of testamentary capacity *in personam* largely overlaps with the more general issue of legal capacity. Whoever was not legally able to act validly could not, of course, even formulate his will. But there were also obstacles specific only to the field of succession law. The fact that their scope was quite considerable is best evidenced by the extensive article in the law book of the city of Brno from the middle of the fourteenth century,[24] as well as by the Latin verses of Roman law provenance taken into Koldín's 'The Municipal Laws of the Kingdom of Bohemia'.[25]

The first, natural limitation was the insufficient age of the testator. Bohemian land law here in a way copied Roman law. However, not in the sense that it adopted its final solution (setting a fixed age of majority, which in Roman law crystallized at fourteen years for boys and twelve years for girls), but by maintaining for a long time the official physical examination of secondary sexual characteristics as an individualized way to solve specific cases (primarily, however, in relation to the termination of tutelage). Thus the humanist scholar and clerk of the county boards, Victorinus Cornelius of Všehrd, advocated this solution in the late fifteenth century and argued in its favour against a fixed age limit.[26] It was only in the Land Constitution of 1549 that the age limit of twenty years for men appeared (somewhat unintentionally),[27] and this was maintained throughout the rest of the period under review. For girls, the fixed age limit of fifteen was not brought in again until the post-White Mountain renewed Land Constitution of 1627.[28] And this is where the similarity with developments in Rome lies, where it was only during the Imperial

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[24] M. Flodr (*ed.*), *Právní kniha města Brna z poloviny 14. Století. I. Úvod a edice* [*Legal Book of the City of Brno from the Middle of the 14th Century. I. Introduction and Edition*], Brno, 1990, p. 361-362, Art. 618.

[25] K. Malý *et al.* (*eds.*), *Práva městská Království českého*, p. 161, Art. E VI. ('*Testari nequeunt: impuber, religiosus / filius, infamis, morti damnatus et obses / prodigus ac stultus, dubius, servus, furiosus / crimine damnatus, cum muto sardus et ille / qui majestátem lesit, sic caecus et ipse / captus ab hostibus, interdictus et haeresiarcha*'). As pointed out by J. Štěpán, *Studie o kompilační povaze Koldínových Práv městských* [*A Study of the Compilation Nature of Koldín's, Municipal Laws*], Prague, 1940, p. 111, Koldín was based here on the glossed edition of the *Corpus iuris civilis*.

[26] H. Jireček (*ed.*), *Codex iuris Bohemici,* vol. 3, part 3. *Exhibens Victorini a Všehrd opus bohemicus 'De jure terrae bohemiae libri novem'*, Prague, 1867, p. 253-255 (Book V, Chap. 45). Interestingly, there is an obvious reminiscence of Roman law here, with the author stating that some want boys to be adults at 14 and girls at 12. In Moravia, the law book of the provincial governor Ctibor Tovačovský of Cimburk was in use at this time, which, on the other hand, referring to the undignified nature of the practice of respectability, favoured specific age limits for boys and girls, namely 16 and 14 for the higher nobility, 17 and 15 for the lower nobility, and 18 and 16 for the non-nobles. V. Brandl (*ed.*), *Kniha Tovačovská* [*The Book of Tovačov*], Brno, 1868, p. 111, Chap. 200.

[27] J. Jireček and H. Jireček (*eds.*), *Codex iuris Bohemici*, vol. 4, part 1, section 1, p. 222, Art. F XII.

[28] H. Jireček (*ed.*), *Obnovené právo a zřízení zemské*, p. 402-403, Art. N XVI. Later, in the middle of the eighteenth century, a much higher age of majority (24 years) was estabilished, which was passed on to the General Civil Code (1811).

period that the fixed age limit began to be offered as an alternative to the physical examination used during the Roman Republic, and eventually became fully established in Justinianic law.[29]

In municipal law, a rather fundamental difference between the Old Town Law and the Magdeburg law is apparent at first sight. In both, however, a fixed age limit was quickly established. As early as 1350, the Council of the Old Town of Prague issued an ordinance according to which orphans over the age of eighteen (men) and fifteen (women) were to be considered adults, and with reference to this ordinance, this regulation was later passed on to Koldín's book.[30] In the Magdeburg law, on the other hand, the age limit of fourteen years for boys and thirteen years for girls was also established in the Middle Ages. Upon reaching this age, the tutelage over orphans was to end, but the young people could then choose their own 'guardian' who would administer their estate until they reached a 'reasonable age' (twenty-one years).[31]

It should be added that both land and municipal law allowed the possibility for fathers to push the age of majority, the termination of guardianship and the taking over of the family property (and consequently the possibility to make their own last wills) to a higher age limit for their children.[32] Girls, on the other hand, were allowed to come of age earlier if they entered into a proper marriage with the consent of their family.[33] It was also within the power of the sovereign or, in towns, the council to grant adulthood before the required age.

Another obvious obstacle preventing making a last will was lack of intellectual capacity. Incapacitated individuals, like minors, were subjected to guardianship after the death of their parents, which was usually entrusted to the nearest relatives.

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29 *E.g.* Ch. Laes and J. Strubbe, *Youth in the Roman Empire. The Young and the Restless Years?*, Cambridge, 2014, p. 30-36; M. Skřejpek, "Věkové hranice v Digestech" ["Age Limits in Digests"], in: M. Skřejpek, P. Bělovský and K. Stloukalová (*eds.*), *Cizinci, hranice a integrace v dějinách* [*Foreigners, Borders and Integration in History*], Prague, 2016, p. 114-136.

30 K. Malý *et al.* (*eds.*), *Práva městská Království českého*, p. 146, Art. D XXVI. par. II., p. 160, Art. E III. Par. I. The law book of Brikcí of Licsko from the year 1536 was apparently inspired by Roman law, as it linked testability to the age of 14 for boys and 12 for girls. J. Jireček and H. Jireček (*eds.*), *M. Brikcího z Licka Práva městská*, p. 313-315, Chap. 66, Art. II.

31 H. Jireček (*ed.*), *Spisy právnické*, p. 116-117, Art. 26.

32 Such a provision appeared explicitly in the 1579 codification of municipal law. K. Malý *et al.* (*eds.*), *Práva městská Království českého*, p. 146, Art. D XXVI. par. III. (besides the father or grandfather, the town council could also postpone the coming of age of the offspring for important reasons). In the land law it can be proved from practice, *i.e.* from the text of specific, respected wills. For example, Wenceslas Bezdružický of Kolovrat in 1600 stipulated that his son should not be given the estate before the age of 24. At the same time, however, he gave his guardians a trust to hand over the estate to him earlier if they considered him fit to manage it responsibly. Prague, Národní archiv, Desky zemské, sign. DZV 142, fol. Ë 29r – E 29v. Similarly, Sigismund of Smiřice decided in 1605 that none of his sons should receive their share of the inheritance until they were 22 years old. Ibidem, sign. DZV 134, fol. D 9v.

33 This was explicitly stated again only in the municipal law. K. Malý *et al.* (*eds.*), *Práva městská Království českého*, p. 160, Art. E III. Par. II.

Such matters were also resolved either in the fathers' last wills[34] or in court. Proceedings of this kind were, however, very rare, which corresponds to the general exceptionality of this situation compared with the situation where, after the death of the father of the family, minor children were left behind. Only the code of municipal law (1579) explicitly mentioned 'common sense and good memory' as conditions for free decision on the fate of one's property after death, which in turn excluded this possibility for 'fools and silly people' ('*blázni a lidé pošetilí*').[35] The same content was given to the concept of 'volatility' in the book of Brikcí of Licsko.[36] In land law, the legal norms were limited to questions of guardianship and the administration of the estate of the 'unwise', without explicitly addressing the capacity to make a will.[37] Physical incapacity, on the other hand, was not an obstacle, and even if the testator was not able to make the will himself, the law allowed it to be dictated or even written by another person.[38]

It is quite understandable that those who were under the power of another person were not allowed to make a will. This refers primarily to children who, although they had formally reached adulthood, had not become independent in property and remained under paternal power (*patria potestas*). Logically, this was based on the assumption that these persons did not even have their own property to bequeath. But there were many exceptions to this rule. Thus, in the land law, unemancipated sons could bequeath goods acquired from or inherited from their wives, as well as movable property and cash money.[39] In Brikcí's law book there is a somewhat confused reference to a military testament, but the Latin words '*in castris*' have been inappropriately translated as 'in castles'.[40] This restriction was elaborated in more detail in Koldín, who suggested that children under paternal power were generally not eligible to testate unless a special property was set apart

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[34] Again, the testament of Sigismund of Smiřice can be recalled, who divided the property among his three sons, but the person and estates of the middle Henry George were to be looked after first by Sigismund's widow and then by the eldest son after he reached the adulthood. Prague, Národní archiv, Desky zemské, sign. DZV 134, fol. D 10v. The phrase 'common sense and good memory' also appears here, which evokes the idea that educated nobles may have been inspired to some extent by the more detailed regulation of municipal law when dealing with their last affairs.

[35] K. Malý *et al.* (*eds.*), *Práva městská Království českého*, p. 151, Art. D XLII. par. III., p. 161, Art. E IV. However, if the intellectual incapacity occurred during life, a will made while the person was still of sound mind was accepted. Similarly, testamentary freedom was naturally restored if the incapacity had passed. Ibidem, p. 163, Art. E XVI., par. I.

[36] J. Jireček and H. Jireček (*eds.*), *M. Brikcího z Licka Práva městská*, p. 313-315, Chap. 66, Art. II. There is also a special provision in the book against changing last wills at a time when the testator is already afflicted with old age 'madness'. *Ibidem*, p. 324, Art. XXI.

[37] J. Jireček and H. Jireček (*eds.*), *Codex iuris Bohemici*, vol. 4, part 1, section 1, p. 217, Art. F IV.

[38] K. Malý *et al.* (*eds.*), *Práva městská Království českého*, p. 151, Art. D XLII. par. IV.

[39] J. Jireček and H. Jireček (*eds.*), *Codex iuris Bohemici*, vol. 4, part 1, section 1, p. 218, Art. F VII.

[40] J. Jireček and H. Jireček (*eds.*), *M. Brikcího z Licka Práva městská*, p. 313-315, Chap. 66, Art. II.

for them, but that an adult son was entitled to bequeath what he had acquired by his own efforts or what he had acquired from friends (relatives) or his wife.[41]

Unlike widows, who enjoyed complete freedom in this regard, wives were similarly limited in their options, subject to the authority of their husbands. The exception, of course, was their own property, which they had not brought into the marriage, nor left later to their husband, and which had not become the subject of an association. Brikcí's book also generally granted them the right to bequeath their 'everyday garments' at will.[42] Their testamentary incapacity was also emphasised by Magdeburg law, which on the other hand explicitly gave the husband the freedom to allow his wife to write a will.[43]

Especially in land law, the loss of honour (*infamia*) had a major impact on legal capacity and thus on the possibility to make a will (or other form of *dispositio mortis causa*). This could occur either by court decision or ipso facto if the nobleman was accused of dishonesty and could not defend himself.[44] The basic normative sources in the field of municipal law do not explicitly mention this obstacle (with the exception of the above-mentioned Latin verses in Koldín, which also includes '*infamis*'), but there is no doubt that in serious cases such a fact could be taken into account.

It is quite probable that the Roman law origin is the incapacity of prodigals, appearing in the law of the city, especially in Brikcí's book.[45] The assessment of who fulfilled this characteristic by their uneconomic behaviour (especially in the somewhat relaxed Renaissance period) was of course largely subjective, but from the point of view of testamentary succession law the matter was relatively simple – prodigality was an obstacle if it was established officially,[46] or in the will of the father who, with reference to it, limited the right of his descendant to dispose of the share of the inheritance that would succeed to him under the will.[47]

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41 K. Malý *et al*. (*eds*.), *Práva městská Království českého*, p. 160, Art. E II., par. II. and III.

42 J. Jireček and H. Jireček (*eds*.), *M. Brikcího z Licka Práva městská*, p. 328, Chap. 67, Art. IV.

43 H. Jireček (*ed*.), *Spisy právnické*, p. 122-123, Art. 36. It should be noted that in the Old Town commentary on this article it was laconically stated that '*multa sunt absurda et ridicula*'.

44 A very extensive article on loss of honour appeared already in the first codification of Bohemian land law from 1500. P. Kreuz and I. Martinovský (*eds*.), *Vladislavské zřízení zemské*, p. 219-220, Art. 428. The problem of noble honour in the early modern period, especially in the environment of the Moravian margraviate (where, of course, the situation in Bohemia was very similar) was dealt with very extensively by J. Janišová (*ed*.), *Šlechtické spory o čest na raně novověké Moravě (Edice rokové knihy zemského hejtmana Václava z Ludanic z let 1541-1556*) [*Noble Disputes over Honour in Early Modern Moravia (Edition of the Proceedings Book of the Provincial Governor Václav of Ludanice from 1541-1556*)], Brno, 2007 (on conditions in the Kingdom of Bohemia especially p. 33-56).

45 J. Jireček and H. Jireček (*eds*.), *M. Brikcího z Licka Práva městská*, p. 313-315, Chap. 66, Art. II. By contrast, Koldin only fleetingly mentioned the prodigal and foolish ("*prodigus ac stultus*") in a list of persons prevented by law from making a will. K. Malý *et al*. (*eds*.), *Práva městská Království českého*, p. 161, Art. E VI.

46 Closer to the procedure against prodigals, squandering family property, *Ibidem*, p. 149-150, Art. D XXXIX., par. III. and IV.

47 In land law, this matter was regulated by a Land Diet´s resolution of 1575, published in A. Gindely, F. Dvorský and J. Pažout (*eds*.), *Sněmy české od léta 1526 až po naši dobu* [*Bohemian*

Municipal law restricted the possibilities of the deaf and dumb to make a last will. Here, in order to be sure that there was a genuine manifestation of their will, only allographic wills were accepted.[48]

Of the other obstacles that appear in the normative sources, the death sentence is certainly the most interesting. From its pronouncement to the execution itself, the condemned person was no longer considered legally competent. If the *Liber testamentorum* of the town of Žatec preserves the will of the burgher Thomas Duchek, who was given a capital punishment for shooting his brother-in-law, this is only an exception confirming the rule. After all, this 'testament' does not actually deal with the issue of inheritance, but is rather a peculiar attempt to cope with an unfavourable fate and preparation for a 'good' Christian death.[49]

3. Property excluded from testamentary capacity

There is hardly any sense in pointing out the self-evident fact that an individual may *mortis causa* decide only on those assets which he is entitled to dispose of *inter vivos*. However, medieval and early modern law, in this case primarily land law, contained a number of specific legal institutions which were also incompatible with testamentary freedom, so to speak.

In the first place, testamentary freedom was practically negated where the existence of undivided family property could be encountered. This undivided estate (*unio*, in Czech *nedíl*), very common in medieval land law, is a legal institution that can be encountered in various places on the European continent in the Middle Ages. In Czech legal historiography, it received particular attention at the turn of the nineteenth and twentieth centuries, when there was a debate about whether it was related to the South Slavic *zadruga* and whether it was a traditional Slavic solution to the property-legal arrangement within the family.[50] However, equally obvious

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Land Diets from the Year 1526 to Our Time], vol. 4, Prague, 1886, p. 269-310, nr. 86 (here p. 287-288). This article was subsequently adopted in the new draft of the land constitution, which had not been approved before the Bohemian Estates Uprising (1618-1620). J. GLÜCKLICH (*ed.*), *Nová redakce zemského zřízení*, p. 198-199, Art. J XLVII.

48 J. JIREČEK and H. JIREČEK (*eds.*), *M. Brikcího z Licka Práva městská*, p. 313-315, Chap. 66, Art. II., K. MALÝ *et al.* (eds.), *Práva městská Království českého*, p. 161, Art. E V.

49 M. HRUBÁ, "*Nedávej statku žádnému*", p. 110-111.

50 K. KADLEC, *Rodinný nedíl čili zádruha v právu slovanském* [*Undivided Estate That is Zadruga in Slavic Law*], Prague, 1898; IDEM, *Rodinný nedíl ve světle dat srovnávacích dějin právních. Za příčinou stati dra. Josefa Pekaře "K sporu o zádruhu staroslovanskou"* [*Undivided Family Estate in the Light of Comparative Legal History Data. For the Cause of the Article by dr. Josef Pekař "On the Dispute about the Old Slavic Zadruga"*], Brno, 1901; O. BALZER, "O zadruze słowiańskiej. Uwagi i polemika" ["About the Slavic Zadruga. Reflections and Polemics"], *Kwartalnik Historyczny* [*Historical Quarterly*] 2/XIII (1899), p. 183-256; J. PEISKER, "Slovo o zádruze. Věnováno J. Gebauerovi k 60. Narozeninám" ["A Word about the Zadruga. Dedicated to J. Gebauer on his 60th Birthday"], *Národopisný věstník československý* [*Czechoslovak Ethnographic Journal*] 5/4 (1899), p. 38-120; J. PEKAŘ, "K sporu o zádruhu staroslovanskou" ["On the Dispute about the Old Slavic Zadruga"], *Český časopis*

analogies can be found with the Germanic institution of the family property community (*Hausgemeinschaft*), documented already at the time of the disruption of the Roman Empire.

In any case, the undivided property community was a community of property owners in which the individual members had neither a fixed nor an ideal share, but acted as equal owners, exercising at the same time the right of use and enjoyment. The conditions of the undivided estate were so specific that some authors refused to think of it as a form of co-ownership at all.[51] At the same time, it is necessary to distinguish consistently the so-called paternal undivided share, which was of a very different nature and was more a way of exercising paternal authority over the adult but unemancipated children than a community of property in the true sense of the word. In this paternal share, it was only the father who freely disposed of the family property and did not have to account to the other members of the family in any way for his actions. If the consent of the wives or sons was sometimes attached to the donations of the fathers, it was not because such consent was a condition for the validity of the relevant legal acts, but because it strengthened the certainty, from the point of view of the beneficiaries, that the act would not be challenged by the survivors in the future.

In the case of a classical undivided family community, whose members were adult collateral relatives, it was apparently possible for each of the undivided members to act independently in everyday matters which did not significantly burden the essence of the undivided family. However, once a legal action of a more fundamental nature was involved, the consent of all members of the community was required. Thus, typically in land law, entries in land tables required the consent of all adult brothers or more distant relatives (uncles). If some were omitted, the deposit was not absolutely invalid, but the absent members of the community could, within the general limitation period, file an opposition and have it annulled. If they did not do so, the arrangement made without their knowledge or even against their will became permanent. The existence of the undivided property also had a major impact in the field of procedural law, since all members of the community were jointly and

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historický [*Czech Historical Magazine*] 3/6 (1900), p. 243-267. Furthermore R. RAUSCHER, *O rodinném nedílu v českém a uherském právu zemském před Tripartitem* [*On the Family Undivided Property in Bohemian and Hungarian Land Law before the Tripartitum*], Bratislava, 1928. From more recent works can be mentioned J. HORSKÝ, "Ältere Diskussion über die Zadruga und die Familienbesitzgemeinschaft in Böhmen und das heutige Studium der Familienstrukturen und Typen" ["Older Discussions on Zadruga and Joint Family Ownership in Bohemia and Today's Study of Family Structures and Types"], *Historická demografie* [*Historical Demography*] 17 (1993), p. 37-51; M. STARÝ, "Nedíl" ["Undivided Property"], in: *Encyklopedie českých právních dějin* [*Encyclopaedia of Czech Legal History*], vol. 4, Pilsen, 2016, p. 199-206. For analogous Polish '*nedział rodzinny*' see B. WALDO, *Nedział rodzinny w polskim prawie ziemskim do konca XV stulecia* [*Family Undivided Property in Polish Land Law until the End of the 15th Century*], Wrocław, 1967.

[51] K. KADLEC, *Rodinný nedíl*, p. 134-136.

severally entitled to active and passive legal proceedings. It was therefore necessary to sue them all – the omission of anyone resulted in a loss of the action.[52]

In contrast to the above-mentioned South Slavic tradition, it was not customary in Bohemia for an elder to be elected or otherwise appointed among the relatives, who would (like the father) be the representative of the property community externally. This representation functioned again only in the so-called paternal undivided share, where, on the contrary, it was forbidden to sue the father's adult sons alongside him,[53] and also in those cases where only one of the undivided sons was an adult and represented the remaining minors.[54]

In any case, it is clear that the very nature of the undivided property precluded anyone from making a final acquisition about it. There was no potential object of inheritance that could be disposed of autonomously. It was different with the private property (*peculium*). In the earliest times, the land law apparently did not provide for it, and whatever the undivided person acquired, he acquired for the whole community. However, in the early modern period a number of legal provisions already provided for the private property of the members of the undivided family.[55]

To a large extent, a similar legal institution was the association (here too the Latin term *unio* or *congressus* was used), the purpose of which was originally (as in the case of the undivided property) to prevent the exercise of the sovereign's right of escheat (*caducum*).[56] In the early modern period, when escheat was dramatically restricted, it was more a decision on the mutual succession of two persons. Compared to the undivided property, the association preserved a wider right of disposition of the associated persons with their own property.[57] However, an understandable limitation was the prohibition of acts of alienation without the consent of the other associate. In any event, there was no space for testamentary succession, since the existence of the association unquestionably determined the legal successor in

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52 P. Kreuz and I. Martinovský (*eds*.), *Vladislavské zřízení zemské*, p. 123, Art. 54 and 55, J. Jireček and H. Jireček (*eds*.), *Codex iuris Bohemici*, vol. 4, part 1, section 1, p. 26, Art. 61 and 62, p. 192-193, Art. D XIII. And D XIV., p. 527-528, Art. C XXVIII. And C XXX.

53 P. Kreuz and I. Martinovský (*eds*.), *Vladislavské zřízení zemské*, p. 122, Art. 51, J. Jireček and H. Jireček (*eds*.), *Codex iuris Bohemici*, vol. 4, part 1, section 1, p. 25, Art. 58, p. 191, Art. D X., p. 527, Art. C XXV.

54 The land law established this casuistically for the case of fraternal undivided property, where only the eldest of the brothers was an adult. P. Kreuz and I. Martinovský (*eds*.), *Vladislavské zřízení zemské*, p. 134, Art. 103, J. Jireček and H. Jireček (*eds*.), *Codex iuris Bohemici*, vol. 4, part 1, section 1, p. 38, Art. 102, p. 235, Art. G V., p. 528, Art. C XXIX.

55 K. Kadlec, *Rodinný nedíl*, p. 90-91. In any event, however, the family undivided property has been perceived by previous research mainly as an institute of land law, while sources and literature provide only fragmentary information about this institute in urban and rural conditions.

56 In this respect, however, the economic dimension of the undivided estate cannot be underestimated, since its purpose was also to preserve the family fortune in a form that ensured its economic functionality.

57 K. Kadlec, *Rodinný nedíl*, p. 98-99.

the event of the childless death of a partner. The said succession in this case concerned all the property.

However, these associations were a rather medieval phenomenon and practically disappeared from legal practice in the early modern period.[58] This was undoubtedly very closely related to the relaxation of the conditions for free dispositions *mortis causa* (see below). Nevertheless, the institution continued to survive, in the area of matrimonial property law. Associations were concluded between spouses, thus creating a community of property, which can be regarded as the first precursor of nowadays institute of communal property of spouses. However, in addition to the mutual association, the essence of which has been outlined above, unilateral associations, where only one of the partners (the spouses) admitted the other to the association, began to appear as early as the High Middle Ages. Typically, these were situations in which the wife took her husband into the association on her dowry or on her other property. Understandably, in unilateral associations, the limitation of testamentary freedom affected only the person who acted as an obligor in the association.

In Bohemian land law, these associations also required formal permission from the sovereign, while in Moravia, which Habsburg rulers rarely visited, this power was delegated to the provincial governor. In municipal law, on the other hand, these property associations, which were widespread in practice, were created only on the basis of a marriage contract or by registration in the municipal books.[59]

Certain similarities with the association were also found in inheritance contracts (sometimes also referred to as *erbanuňk*, which was a Czech corruption of the German term *Erbeinigung*), which, however, were very rare in Bohemian law. Their conclusion could take place between more distant relatives of the same noble family, or between members of different noble families. As an example of the former, the contract between Zacharias of Hradec and his nephew Adam in 1585[60] can be mentioned. The most famous example of a contract between two separate families is, beyond any doubt, the treaty between the lords of Rožmberk and those of Švamberk of 1484, on the basis of which, after the extinction of the Rožmberks in

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58 J. KAPRAS, *Manželské právo majetkové* [*Matrimonial Property Law*], Prague, 1908, p. 64.

59 P. SLAVÍČKOVÁ, "Rodinné právo v Právech městských Království českého. Komentář k rodinnému a manželskému právu zákoníku Práv městských Království českého z roku 1579" ["Family Law in The Municipal Laws of the Bohemian Kingdom. Commentary on Family and Matrimonial Law in The Municipal Laws of the Bohemian Kingdom of 1579"], in: K. MALÝ *et al*. (*eds*.), *Práva městská Království českého. Edice s komentářem* [*The Municipal Laws of the Bohemian Kingdom. Edition with Commentary*], Prague, 2013, p. 729.

60 It is mentioned *e.g*. by J. PÁNEK, "Česká a moravská aristokracie v době Adama II. z Hradce" ["Bohemian and Moravian Aristocracy in the Time of Adam II of Hradec"], *Opera historica* 6 (1998), p. 77-90, who refers to relevant archival sources. See also D. VODIČKOVÁ, "Spor o dědictví Zachariáše z Hradce v letech 1589-1594" ["The Dispute over the Heritage of Zacharias of Hradec in 1589-1594"], in: J. Kubeš and R. Prchal Pavlíčková (*eds*.), *Šlechtic mezi realitou a normou. Miscellanea ze studentských prací k dějinám raného novověku* [*A Nobleman between Reality and the Norm. Miscellanea from Student Papers on the History of the Early Modern Period*], Olomouc, Pardubice, 2008, p. 63-93.

1611, most of their property actually came into the hands of the Švamberks.[61] It should be added that in both cases wills were also drawn up, but they more or less respected the content of the inheritance contracts.

At the end of the period under review, *i.e.* at the end of the sixteenth century, the institution of *fideicommissum* (family trusts), imported from the West, began to be used among the Bohemian nobility.[62] Its establishment was again possible only with the consent of the monarch. If this was done, the property in question ceased to be understood as freehold property in the future,[63] but became inviolable (family) property, the possession of which passed according to predetermined rules. But the individual holders were only trustees of this property, they were not allowed to encumber it, and of course they were not allowed to make last wills about it.

Although *fideicommissum* was traditionally associated only with the nobility, it is worth noting that the provision on fiduciary estates also appears in the extract from the Magdeburg laws. There, too, bequests were in principle prohibited, even if they could be made with the consent of the potential beneficiaries, who then had to be left at least a third of the estate so bequeathed.[64]

Lastly, if the issue of matrimonial property has already been mentioned above, it should be added that the whole area of matrimonial property law was to a considerable extent intertwined with, or competed with, inheritance law. Both in the law of the land and in the law of the town, and ultimately also among the subjects, it was valid that the bride brought a dowry to the marriage as a contribution to the economic base of the newly founded family (which was also understood as her natural share in the property of the family from which she was separated). The counterpart she received from her husband was the so-called widow's dowry (in Czech *vdovské věno*, also *obvěnění*, sometimes inaccurately German *Morgengabe*, which has a somewhat different character), which should ensure her financial security in case she survived her husband.[65]

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61 Following the royal permission of 26 August 1484, the treaty was concluded on 9 December of the same year. Státní oblastní archiv [State District Archives] Třeboň, fond Cizí rody Třeboň [Other Houses], sign. z Rožmberka 5/21, no. 259a, sign. z Rožmberka 5/22, no. 260. On the final acceptance of the treaty, which was preceded by a struggle for recognition of its validity, V. Bůžek, "Aliance Rožmberků, Zrinských ze Serynu a Novohradských z Kolovrat na počátku 17. století" ["The Alliance of Rožmberk, Zrinsky of Seryn and Novohradsky of Kolovrat at the Beginning of the 17th Century"], *Jihočeský sborník historický* [*South Bohemian historical anthology*] 65 (1996), p. 10-25.

62 About the Bohemian family fideicommissums more closely J. Kapras, *Velkostatky a fideikomisy v českém státě. Studie historická* [*Grand Estates and Fideicommissums in the Czech State. Historical Study*], Prague, 1918; V. Urfus, "Rodinný fideikomis v Čechách" ["Family Fideicommissum in Bohemia"], *Sborník historický* [*Historical Anthology*] 9 (1962), p. 193-238; V. Šolle, "Fideikomisy a jejich současná archivní problematika" ["Fideicommissa and their Current Archival Issues"], *Archivní časopis* [*Archival Magazine*] 2/21 (1971), p. 103-115.

63 In principle, nothing prevented the fideicommissum from being established from the fief estates, provided that the consent of the fief sovereign was obtained. The Frýdlant Duchy of the Imperial Generalissimo Albrecht von Wallenstein is a prime example.

64 H. Jireček (*ed.*), *Spisy právnické*, p. 122-123, Art. 36.

65 The German term *Morgengabe* also appears in Czech sources, but the actual morning gift in its original sense was not used in Bohemia.

The widow's dowry was particularly important in land law, as it did not attribute to the wife any right to the intestate succession. In most cases, it was practically the only source of her livelihood in her old age. Its amount was generally set at two and a half times the widow's *dos*; if the bride was a widow, the standard was reduced to twice that. However, it can be seen from the sources that these legal requirements were often not respected, and newlyweds provided their partners with a lower or even higher dowry.[66] In any case, the amount of the widow's dowry was in most cases determined in the marriage contracts and later entered into the land registers. The fact that the dowry would actually be paid to the widow after her husband's death was usually secured by a pledge on immovable property or by guarantors.

In relation to the inheritance, the widow's dowry was a privileged claim which always had to be settled first. In practice, this meant that it was an asset unencumbered by the debts of the husband, *i.e*. on which other creditors could not, in the normal state of affairs, lay claim.[67] The part of the property which provided for his wife in the event of his early death could therefore not be validly bequeathed by the husband.

The institute of widow's dowry also functioned in Bohemia in municipal law, where it also complemented inheritance law quite organically. Primarily, it was also assumed that the woman would be guaranteed a widow's dowry upon marriage. The amount of the dowry was not strictly regulated initially, but it was obviously envisaged from the outset to be correlated with the value of the property that the woman herself would bring into the marriage. Yet in Brikcí's book it is only generally announced that the smaller the bride's dowry, the smaller the widow's dowry.[68] The law of the towns of the Magdeburg area from the sixteenth century, which also provided for an endowment instead of the original Magdeburg *Morgengabe*, did not explicitly refer to its amount.[69] It is only in Koldín that the obligatory two and a half times the dowry of the bride is taken over from the law of the land, developed by a special norm where the widower is to provide the virgin with three times the dowry.[70]

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66 In addition, Bohemian law also knew the institute of over-dowry, which husbands later added to their wives.

67 In more detail J. Kapras, *Manželské právo majetkové*, p. 29-47, 54-62 and 66-75.

68 J. Jireček and H. Jireček (*eds*.), *M. Brikcího z Licka Práva městská*, p. 120, Chap. 18, Art. XI.

69 H. Jireček (*ed*.), *Spisy právnické*, p. 104-105, Art. 8. See also J. Štěpán, "Litoměřický Extrakt z r. 1571" ["Litoměřice Extract from 1571"], in: V. Vaněček (*ed*.), *Miscellanea historico-iuridica. Sborník prací o dějinách práva napsaných k oslavě šedesátin JUDra Jana Kaprasa, řádného profesora Karlovy univerzity, jeho přáteli a žáky* [*Miscellanea Historico-Iuridica. A Collection of Papers on the History of Law Written to the Celebration of the Sixtieth Birthday of JUDr. Jan Kapras, Ordinary Professor at Charles University, by his Friends and Students*], Prague, 1940, p. 259-260.

70 K. Malý *et al*. (*eds*.), *Práva městská Království českého*, p. 132-133, Art. C XXXVII. – C XXXIX.

It is interesting to hypothesize that the system of the so-called widow's third in the municipal law is related to land law according to which the widow's dowry had to be two and a half times the bride dowry.[71] This two and a half times multiple was expressed in Old Czech by the nowadays hardly understandable phrase 'one third more' ('*třetinou vejš*'). The widow's third concerned the area of intestate succession. It meant that after the husband's death, the wife was always left with one third of his property and the remaining two thirds were shared by the children or other blood heirs. However, the principle of equal shares of the wife and children was also enforced in the Bohemian environment, and where archaic customs had their place, the right of inheritance of wives – similar to the law of the land – was not recognized at all.[72]

The two most important legal books from the sixteenth century speak a slightly different language in this respect. Brikcí states, with reference to the 'old law', that in the event of the death of a husband, the wife is to receive one third of the surviving estate, the other two thirds are to go to the heirs.[73] However, in other articles that deal with intestate succession, there is no mention of the widowed wife.[74] Indeed, at first sight, the question arises that if widows were obligatorily to receive one third of the deceased husband's property *ab intestato*, what would be the point of ensuring them at the time of marriage?

A quite logical explanation is offered by Koldín's 'The Municipal Laws of the Kingdom of Bohemia'. Here, the widow's claim to one third of the estate (the other two were to go to her children or other blood relatives) was subject to two conditions: that the marriage lasted more than a year, and above all that the husband had not adequately provided for her either in his will or through the institution of a widow's dowry.[75] Interestingly, Koldín also introduced a reciprocal rule – the husband was also entitled to one third of his wife's estate if she died *ab intestato* and he had not been adequately provided for by her or otherwise.[76] However, if the surviving spouse (and this was undoubtedly the case for wives in particular) was provided for in this way, he was no longer included in the intestate succession – in

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71 A. Haas, "Omezení odúmrti a vdovská třetina v starém českém městském právu" ["Restrictions on Escheat and the Widow's Third in Old Bohemian Municipal Law"], *Právněhistorické studie* [*Legal Historical Studies*] 17 (1973), p. 214.

72 A. Haas, "Omezení odúmrti", p. 211-215. The observance of the widow's third principle, which was also applied as a correction in the area of testamentary inheritance law, can be consistently encountered in the Middle Ages, *e.g.* in Brno city law. M. Flodr, *Brněnské městské právo. Zakladatelské období (-1359)* [*Municipal Law of Brno. The Founding Period (-1359)*], Brno, 2001, p. 294. For the serf environment, the two basic systems (equal shares, widow's third) in detail V. Procházka, *Česká poddanská nemovitost*, p. 479-488.

73 J. Jireček and H. Jireček (*eds.*), *M. Brikcího z Licka Práva městská*, p. 291-292, Chap. 64, Art. II.

74 *Ibidem*, p. 292-295, Chap. 64, Art. III. – VI.

75 K. Malý *et al.* (*eds.*), *Práva městská Království českého*, p. 133, Art. C XLII.

76 *Ibidem*, p. 133, Art. C XLIII.

that case only the descendants came first, then possibly the ascendants and collateral relatives.[77]

If in the latest commentary on Koldín there is a claim that after the death of one spouse the other was entitled to one third of his estate,[78] this is an unfortunate generalisation. It is true, however, that the successful codification was based on the premise that a fair recovery should not fall below one-third of the husband's estate for a 'faithful' wife, but this was true only if the marriage remained childless and the wife had not engaged in conduct that would result in the equitable forfeiture of this claim of hers.[79] Nor is the principle of equal shares, *i.e*. the widow was to receive the same share as each of the surviving children in intestate succession, contained in Koldín.[80]

In towns governed by Magdeburg law, the archaic institutions of male armour (*hergwet*) and female equipment (*grod, gerade, rade*) were still maintained in the early modern period. This was actually a part of the estate that had a completely separate legal regime and did not follow the fate of the rest of the estate. The *hergwet* (also *herbot* or *Herrwath*) was male armour and equipment, which was always to be inherited automatically by the nearest able-bodied male relative. *Grod* were a woman's personal belongings, especially clothing, jewellery or bedding. In addition to these, the surviving widow was also entitled to *musteil*, *i.e*. half of the provisions in the larder.[81]

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77 *Ibidem*, p. 180-182, Art. F VII. – F XV.

78 P. Skřejpková, "Majetková práva. Komentář k soukromoprávním ustanovením v Právech městských Království českého z roku 1579" ["Property Rights. Commentary on the Private Law Provisions in the Municipal Laws of the Bohemian Kingdom of 1579"], in: K. Malý *et al*. (*eds*.), *Práva městská Království českého. Edice s komentářem* [*The Municipal Laws of the Bohemian Kingdom. Edition with Commentary*], Prague, 2013, p. 720.

79 K. Malý *et al*. (*eds*.), *Práva městská Království českého*, p. 134, Art. C XLIV. The reasons given for the loss of the right to adequate provision are separation from the husband, failure to take care of him in illness, gossip, the lamentation of husband's honour in front of his parents and relatives, disorderly living, and finally bohemian living and sleeping away from home against the husband's will.

80 V. Knoll, "Intestátní dědická posloupnost", p. 242, referring to the article M VIII. Of the Koldín´s book. However, this article only speaks of equal inheritance shares for male and female descendants. In fact, the equality of shares in Koldín appears only in the specific case of the settlement of property matters after the death of a husband who had entered into a community of property with his wife. K. Malý *et al*. (*eds*.), *Práva městská Království českého*, p. 139, Art. C LXI.

81 The form into which these institutes crystallized in the second half of the sixteenth century was captured by the Litoměřice Extract of 1571. H. Jireček (*ed*.), *Spisy právnické*, p. 105-109, Art. 9-11. The attached commentaries of the defenders of the Old Town law classify these institutes as 'useless' and 'unnecessary'. Women's equipment was discussed in detail by A. Haas, "'Ženský nábytek' v magdeburské oblasti českého městského práva ["'Women's Furniture' in the Magdeburg Area of Bohemian Municipal Law"], in: *Sborník prací Filosofické fakulty Brněnské univerzity. Řada historická* [*Proceedings of the Faculty of Philosophy of the University of Brno. Historical Series*], C 7, 9 (1960), p. 141-150, and J. Mareš, "Ženská výbava v Litoměřickém městském právu v předhusitské době" ["Female Equipment in Litoměřice City Law in the Pre-Hussite Period"], *Porta Bohemica* 4 (2007), p. 54-91. A brief description of these institutes is provided by M. Hrubá, "*Nedávej statku žádnému*", p. 61, 73, and V. Knoll, "Intestátní dědická posloupnost", p. 243.

4. Content limits of the will

While the preceding passages have dealt with property which could not become the subject of a will because the law clearly defined its future fate, it is now appropriate to turn to another, closely related issue. Namely, to what extent the testator was really free to dispose of his property and to what extent the law prescribed to whom he was to leave part of his property. In other words, this raises the question of the compulsory share of inheritance. This, as already mentioned above, belonged in municipal law to the surviving wife, or possibly to the husband if the marriage lasted for a certain period of time and remained childless. Koldín's law book then still demanded proper conduct in marriage in relation to wives, since certain enumerated transgressions could lead to loss of their claim.

Above all, however, there is the question of the obligatory share for the testator's descendants. Already in Roman law, persons subject to the power of the *paterfamilias* were among the *haeredes sui et necessarii* and had to be named in the will; over time, they were also required to receive a real share of the estate. In this respect, attention was focused primarily on the children as the most natural heirs and also as the successors of the bloodline and, in the case of sons, of family continuity.

In Bohemian early modern land law, the position of sons who were not separated from their father by property was the main issue in this respect. Such a son was regarded as a true heir (*verus heres*) and the father was not allowed to disinherit this son completely by his will. What is more, if there were several sons, they had to be provided with equal shares. Otherwise, they could seek a new division of the estate through a court proceeding.[82] But legal practice also seemed to allow for situations in which a son lost his claim to a share of his father's estate – Všehrd, in his interpretation of the differences, emphasized that a son who injured his father (except in self-defence) lost his claim to a share of the family estate, as did a brother or other relative if a family undivided estate was divided.[83] Sons who committed themselves to the clerical state were entitled only to financial provision.[84]

The above-mentioned very strong position of the unseparated son in inheritance law was the reason for an otherwise surprising norm that appeared first in Moravian and later in Bohemian law, namely that the father could not separate the adult son without his consent. Such a separation meant that the son lost his right to a compulsory and equal share of the inheritance, which may not have been advantageous for him. In Moravia, a prohibition of unilateral separation appeared in the

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82 R. Rauscher, *Dědické právo*, p. 41-42. He refers to an extensive finding of a land court in the dispute between the brothers Kordule of Sloupno from the turn of the fifteenth and sixteenth centuries, edited by J. Emler (*ed.*), *Reliquiae tabularum terrae regni Bohemiae anno MDXLI igne consumptarum. Pozůstatky desk zemských království českého r. 1541 pohořelých*, vol. 1, Prague, 1870, p. 184-186, no. 135.

83 H. Jireček (*ed.*), *Codex iuris Bohemici*, vol. 3, part 3, p. 262-263 (Book VI., Chap. 7, par. 6.).

84 R. Rauscher, *Dědické právo*, p. 43.

'Book of Tovačov' (*Kniha Tovačovská*) from the end of the fifteenth century, accompanied by a norm according to which, in the event that it did occur, the son retained his right to the inheritance.[85] For quite a long time, Bohemian law concentrated on the inverse question of whether an adult son had the right to demand a share of the inheritance from his father even against his father's will.[86] It was not until the Land Constitution of 1549, in connection with the prohibition of bequeathing property to the detriment of children, that the only exception was formulated whereby the father could make such a disposition at the expense of the separated son, provided that the son consented to his previous separation.[87]

It should be added that where the said norm referred to children, sons were meant. The position of daughters in the law of inheritance was much weaker (although the development here was gradually moving towards a certain degree of equality) and was limited to the right to the payment of a corresponding dowry in the event of marriage or entry into a monastery.

Much more modern in this respect was the municipal law, which recognized equal rights of descendants of both sexes. At the same time, it emphasised the free will of the testator to dispose of his property, possibly even at the expense of his descendants. Very telling in this respect is a provision in Brikcí's law book of 1536, which emphasises that anyone may bequeath his property to whomever he sees fit, even against the will of his wife and children.[88]

Koldín on the one hand emphasised the freedom of the burgher to dispose of his property as he wished, but on the other hand he imposed the obligation to bequeath a certain part of his property to his 'obedient' children. The size of such a share was, however, not regulated in any way and the relevant article stressed that each of the children was obliged to be content with it and could not claim anything extra.[89] The parent's discretion explicitly included the possibility to divide the property between the children in a completely differentiated manner, while inequality of shares could not be a ground for a successful challenge to the will.[90] The whole concept clearly shows influence of Roman law. Including the fact that if any of the children were to be completely omitted in the distribution of the estate, it was necessary to explicitly disinherit them and to give a specific reason for such *exheredatio* (fourteen reasons appear in 'The Municipal Laws of the Kingdom of Bohemia', this list being merely demonstrative).[91]

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85 V. Brandl (*ed.*), *Kniha Tovačovská*, p. 81-82, Chap. 151.

86 R. Rauscher, *Dědické právo*, p. 19-21.

87 J. Jireček and H. Jireček (*eds.*), *Codex iuris Bohemici*, vol. 4, part 1, section 1, p. 217-218, Art. F VI.

88 J. Jireček and H. Jireček (*eds.*), *M. Brikcího z Licka Práva městská*, p. 328, Chap. 67, Art. V.

89 K. Malý *et al.* (*eds.*), *Práva městská Království českého*, p. 173-174, Art. E XLVIII, par. I.

90 *Ibidem*, p. 175, Art. E LI., par. I.

91 *Ibidem*, p. 174-175, Art. E XLVIII, par. II, Art. E XLIX., E L.

5. Necessity of consent of a higher authority

In Koldín's law book there was a categorical prohibition of testing children without the permission of their parents (meaning, of course, unemancipated children, remaining under paternal authority) and serfs without the consent of the manorial lords.[92] The Litoměřice Extract of 1571 stated the same for serfs, which also made the validity of last wills of married women conditional on the consent of their husbands.[93]

However, as it has already been shown above, in reality children could make a last will even without the consent of the fathers, and as far as wives were concerned, in practice there was nothing to prevent them from making wills, as long as these related to their own property. The situation was also more complicated in the case of serfs. The codification of Koldín did not apply to them *a priori* and their ability to decide freely about their property *mortis causa* depended on the good will of their manorial lords. As the surviving sources show, in many manors the lordship waived the right of bequest and in connection with this left the subjects the possibility of bequeathing their property without any restrictions. For example, we can point at the liberal mandates for the subjects of the Prague archbishopric (1386) and the Litomyšl bishopric (1412).[94] The above-quoted provisions should thus be applied to situations where the estate of personally non-free persons was dealt with in an urban environment. In royal towns, this was probably not a particularly common case, while in serf towns it was a matter of what privileges a particular locality managed to obtain from its lord.

In the royal towns themselves, the situation was greatly simplified by the fact that already during the fourteenth century the Bohemian kings had resigned their escheat claims, which opened up a wide space for both the intestate succession of blood relatives and the testamentary freedom of the townsmen.[95]

The situation in land law, on the other hand, was dramatically different. Noble succession was particularly attractive to the monarch, and therefore both the

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92 *Ibidem*, p. 160, Art. E II., par. IV. On the possibility of bequeathing property by serfs and gradually overcoming the need for the permission of the manorial lords and the possibilities of their interference in detail, see V. Procházka, *Česká poddanská nemovitost*, p. 496-499.

93 H. Jireček (*ed.*), *Spisy právnické*, p. 122-123, Art. 36.

94 On the escheat and freedom of bequeathing of archiepiscopal and episcopal serfs, see the materials collected by J. Kalousek (*ed.*), *Archiv český čili Staré písemné památky české i moravské sebrané z archivů domácích i cizích* [*Bohemian Archive i.e. Old Written Monuments of Bohemia and Moravia Collected from Domestic and Foreign Archives*], vol. 22, Prague, 1905, p. 6-7, no. 7.

95 The turning point came on 19 September 1372, when emperor Charles IV issued a group of charters granting these privileges to all Bohemian royal towns, following the example of the Old Town of Prague, which had been granted this privilege on 4 August 1366. J. Čelakovský (*ed.*), *Codex iuris municipalis regni Bohemiae*, vol. 1: *Privilegia civitatum Pragensium*, Prague, 1886, p. 142-144, no. 87, Idem (*ed.*), *Codex iuris municipalis regni Bohemiae*, vol. 2. *Privilegia regalium civitatum provincialium annorum 1225-1419*, Prague, 1895, p. 649-664, č. 455-490.

extension of intestate succession[96] and the testamentary freedom were only slowly and reluctantly enforced. The possibility of disposing of one's property *mortis causa*, especially immovable property, was from the very beginning seen as a unique privilege granted by the monarch. Without the explicit royal consent, which gradually took the established form of a 'mighty letter' (*list mocný*, *i.e.* a document conferring the power to bequeath property), the making of a will was not possible, or such a will was not considered valid. This applied to allodial as well as fief estates – only the legal title from which the sovereign's permission was required differed.

As 'mighty letters' were originally very exclusive documents, difficult to obtain for most nobles, legal practice sought ways to circumvent this difficult condition. The first way was through acts of alienation, by which the owner transferred more or less of his property to selected persons (children, relatives) during his lifetime, whatever the formal legal title. This motive is also strongly applied in the rural serf population, where the assignment (sale) of property to one of the children or other relatives was quite common. In many cases, one of the motives is the desire to circumvent the institute of the manorial lord's permission.[97]

Another option was a gift with delayed effect or a gift with preservation of the right of use. It could take various forms – oral, deed or registration by land tables.[98] However, such an act was clearly contrary to the interests of the sovereign and that was the reason why restrictions were applied against this solution. That is to say, even here, the sovereign's permission was usually required. The *Codex Carolinus*, which originated in the middle of the fourteenth century but did not gain legal force due to the opposition of the nobility, sought to prevent donations through the land tables by requiring, in addition to the royal consent, that the physical transfer of the property to the purchaser should take place within one year.[99] In any case, this method was used relatively little, and if so especially for the benefit of ecclesiastical institutions, which enjoyed royal support in this respect.

In order to circumvent the royal escheat, a more camouflaged procedure based on the institution of pledge was used in the Middle Ages.[100] Specifically, this involved the registration in the land tables in which the grantor confessed to a fictitious debt in favour of a chosen heir and guaranteed the payment of this debt with all his property. However, the maturity of the debt was established only by the death of the alleged debtor (alternatively, the assignment of the estate could be immediate,

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96 Here again, it is necessary to draw attention first of all to the study V. KNOLL, "Intestátní dědická posloupnost", p. 235-244.

97 V. PROCHÁZKA, *Česká poddanská nemovitost*, p. 459-461.

98 More specifically R. RAUSCHER, *Dědické právo*, p. 57-60, 73-74.

99 F. PALACKÝ (*ed.*), *Archiv český čili Staré písemné památky české i moravské sebrané z archivů domácích i cizích* [*Bohemian Archive i.e. Old Written Monuments of Bohemia and Moravia Collected from Domestic and Foreign Archives*], vol. 3, Prague, 1844, p. 137-142, Art. 58-61.

100 R. RAUSCHER, *Dědické právo*, p. 74-79, J. KAPRAS, *K dějinám českého zástavního práva* [*On the History of Bohemian Pledge Law*], Prague, 1903, especially p. 75-78.

but subject to the usufruct rights of the previous owner). The amount of the debt mentioned in the land tables was usually low and bore no relation to the actual value of the property bequeathed in this way. It was therefore a forfeitable mortgage and usually without possession (*hypothec*). The first evidence of this solution appears in Bohemia in the second half of the fourteenth century,[101] but the roots of it are undoubtedly older, which is also indirectly apparent from the provisions of emperor Charles IV's rejected code already mentioned.

The disadvantage of these entries in their original form was that they were difficult to revoke if the testator ('debtor') changed his mind. In such a case, he could not unilaterally change his disposition, since, of course, one cannot unilaterally declare his own debt cancelled or paid. The cancellation of such an entry thus required the consent of the heir ('creditor'), which was understandably difficult to obtain in many cases. This is probably why, as early as the fourteenth century, a more sophisticated practice of entries 'with space' developed, which soon became quite prevalent.[102] The novelty of this form of entries was the space omitted in the text after the name of the oblate. If for some reason the testator decided to change his last will, it was sufficient to add a trusted person in the vacant space, who then 'released' the entry to the testator, *i.e.* added his consent to its cancellation. It was customary – and this was also explicitly stated in the text of these entries – that in the case of several creditors, anyone of them could independently and fully 'release' the entry. Thus, already at the end of the fifteenth century Všehrd, who in his work best described the practice of feigned entries of debts, considered this newer form of entry to be the absolute standard and, on the contrary, the original entries 'without space' to be quite exceptional.[103]

It would seem logical that the need for royal permission to make a will would disappear after 1497, when the Bohemian nobility extorted King Vladislav II Jagiello the privilege, traditionally interpreted inaccurately as a waiver of the royal right of escheat.[104] In reality, however, the opposite was true. Mighty letters continued to be issued from the Bohemian chancery and remained a *sine qua non* condition for the validity of a standard noble will. Something had changed, however: such permissions became common pragmatic documents, the issuance of which was

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101 R. Rauscher, *Dědické právo*, p. 78. In contrast, J. Kapras, *K dějinám českého zástavního práva*, p. 77, linked the first evidence of these records to the beginning of the fifteenth century.

102 J. Kapras, *K dějinám českého zástavního práva*, p. 77, stated that the first such record is documented from 1463. But already R. Rauscher, *Dědické právo*, p. 78, pointed to a reference from 1390, which in his opinion clearly testifies to the use of this more advanced form.

103 H. Jireček (*ed.*), *Codex iuris Bohemici*, vol. 3, part 3, p. 286-287 (Book VI, Chap. 35.- 36.).

104 F. Palacký (*ed.*), *Archiv český čili Staré písemné památky české i moravské sebrané z archivů domácích i cizích* [*Bohemian Archive i.e. Old Written Monuments of Bohemia and Moravia Collected from Domestic and Foreign Archives*], vol. 5, Prague, 1862, p. 465-477, no. 51 (here p. 467-468). Understandably, this privilege was also subsequently included in the codifications of land law. P. Kreuz and I. Martinovský (*eds.*), *Vladislavské zřízení zemské*, p. 238-239, Art. 480, J. Jireček and H. Jireček (*eds.*), *Codex iuris Bohemici*, vol. 4, part 1, section 1, p. 226-227. Art. F XXV., p. 582, Art. I LII.

almost demanding, and which had acquired a new meaning. Fees for the issue of letters of marque began to act as a subsidiary, but not insignificant, revenue stream for the royal treasury.

In spite of this, the long-established practice of fictitious debt entries continued to operate. Their standard form, however, changed to some extent in the sixteenth century. In a way, that showed that they were no longer a disguised legal act, but a generally accepted alternative to the classical legal will. The practice of omitting a place for a trusted co-trustee was abandoned, and instead a clause, hardly imaginable in bond relationships, appeared at the end of these entries, reserving the right of the depositor of the entry to unilaterally amend, extend, or even release himself from the record (*i.e.*, cancel it).[105]

The other possibility of formulating a last will, which the pre-White Mountain legal practice offered to nobles, was the intabulation of guardianship. In it, as the name suggests, the question of the security of minor descendants was primarily addressed. However, this security included not only the care of the children themselves, but also of their property. Some noblemen therefore also used this route to elaborate on their idea of how their estate should be distributed after their death.

The above-mentioned variety of methods that could be used in Bohemian land law for the last will was reduced only after the White Mountain, when the use of fake debt entries was explicitly prohibited in the Renewed Land Constitution of 1627.[106] As the monarch at the same time definitively renounced the right to issue mighty letters,[107] the main obstacle discouraging some nobles from drawing up the classical will was removed and it became practically the only universal form used for the expression of the last will in the future.

In municipal law (of course, alongside the various forms of settling property relations *inter vivos*), the form of testament had been standard since the High Middle Ages and there was no reason to replace it with complicated alternatives.[108]

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105 See *e.g.* the records of the childless Zikmund Chlum of Chlum from 1591 and 1594 in favour of his collateral relatives. Národní archiv Praha, Desky zemské, sign. DZV 91, fol. D 29v a J 26v – J 27v. On the wider context of this legacy M. Starý, "Vymření rodu Chlumů z Chlumu a zánik rytířského statku Újezdec" ["The Extinction of the Family Chlum of Chlum and the Termination of the Újezdec Knightly Estate"], *Středočeský sborník historický* [*Central Bohemian Historical Anthology*] 30-33 (2004-2007), p. 62-87.

106 H. Jireček (*ed.*), *Obnovené právo a zřízení zemské*, p. 404-407, Art. O II.

107 Ibidem, p. 406-407, Art. O III.

108 P. Skřejpková, "Majetková práva", p. 721, also mentions in her interpretation of entries with and without a place, and although she connects them primarily with the land law, she also admits the possibility of such entries in the town books. She refers to Article G 50 of the codification. However, the latter actually refers to market registrations (*i.e.* purchases of immovable property). See K. Malý *et al.* (*eds.*), *Práva městská Království českého*, p. 215, Art. G L. There is also no mention of records in the area of municipal law by M. Stieber, *Dějiny soukromého práva v střední Evropě. Nástin. Kniha I. Samostatný právní vývoj* [*History of Private Law in Central Europe. Outline. Book I. Independent Legal Development*], Prague, 1923, p. 124-126.

6. Conclusion

The present study has opened up a number of sub-issues, each of which would deserve a much more detailed analysis in the form of a separate study, if not a monograph. Within the given scope, it was only possible to make a somewhat more comprehensive survey of the various limits and constraints on the individual's freedom to make a testament in the early modern period. This overview is, however, made all the more complicated by the fact that the legal order in the Bohemian Kingdom in the sixteenth century broke down into a number of segments. This particularism of the Bohemian law was primarily based on the principle of personality, coupled with social stratification, with different groups of the population 'living by their own law'.

Regardless of the above-mentioned fragmentation of the legal order, it is undoubted that, systemically, the same four issues can be identified in both land (aristocratic) and municipal law, as well as in the (largely customary) legal norms regulating the life of the serf population, the examination of which leads to the identification of the limits outlined above. Simply said, one can ask who has no right to make a bequest of their property, what cannot be bequeathed (*i.e.* what part of an individual's property is excluded from the possibility of being bequeathed), to whom it can be bequeathed (which includes the issue of the obligatory share for the nearest, 'proper and necessary' heirs) and, finally, to what extent testamentary freedom is conditional on the consent of a higher authority (the sovereign, the manorial lords).

As to the personal limitation, the incapacity to bequeath was linked to general incapacity or limited capacity to act. It was not permitted for persons who were underage (and the fixed age of majority was gradually and sometimes rigidly enforced, as in ancient Rome, at the expense of physically monitoring individuals who approached the limit of childhood and adulthood) and intellectually deficient to make a valid will, and, especially in the land law, the loss of honour (infamy) had a fatal impact on the legal personality of the individual. Other limits probably had their origin in Roman law – whether it was the incapacity of the prodigal or the partial incapacity of the deaf and dumb. In a way, the Bohemian law also contains limitations on the capacity of persons *alieni iuris*, *i.e.* adult members of the family, subject, however, to the paternal (marital) power. However, while children could make last wills only with the consent of the father, or sons with respect to property acquired outside the family (*e.g.* from their wives or by inheritance), wives had somewhat greater freedom in relation to property that remained their exclusive possession after the marriage. However, there is not complete agreement between the various normative sources in this area and the issue would certainly require further research in the light of the surviving material.

Another problem of inheritance law was the extent to which a potential testator could dispose of his property at all. Particularly in the Middle Ages, but also later, it was common in a noble environment for family property to be held

undividedly by all mature members of the family. In modern terms, there was an undivided joint ownership, which all adult co-owners had to dispose of in concert. At the same time, these owners formed a community, regularly based on a closer or extended family. On the death of one of them, only the number of members of the community changed, and it was of course not permissible for the deceased undivided shareholder to attempt in any way to decide about the undivided share or any part of it independently mortis causa. The situation was to some extent similar in the case of the so-called associations – unlike the undivided shares, which arose naturally within the family, these associations were artificial unions of property, leaving, however, a wide range of dispositions to the individual partners and primarily directed only at the time of the death of one of them and the subsequent legal succession of the survivor. It was very common for these associations to be concluded between spouses, which applied not only to the land law but also to the municipal law. In the land law, other institutes that did not allow for the free inheritance of property were the not very frequent inheritance contracts and only later, at the end of the sixteenth century, the slowly appearing family trusts (*fideicommissa*), whose founding documents clearly and bindingly stipulated for the future according to which principle their possession would pass. Each holder was formally only the trustee of the property in question and was therefore not entitled to bequeath it at all.

The second fundamental substantive limitation of testamentary freedom was due to the close intertwining of inheritance law with matrimonial property law. The primary means of providing for a widowed wife in both land and municipal law was widow´s dowry. This was already guaranteed to her at marriage and the husband could not therefore decide on it in his will. While in the land law this settled the matter and a woman was not entitled to inherit from her husband in principle (except for what was expressly bequeathed to her), some sources of the municipal law speak of it in the context of intestate succession. It is fair to say, however, that these sources and, in principle, the specialist literature, often do not consistently distinguish between what was to accrue to the woman by virtue of her provision and what by way of inheritance. In the latter case, of course, testamentary succession took precedence over legal succession. The only exceptions were the archaic institutions of male armour (*hergwet*) and female equipment (*grod*) in Magdeburg law. These were specific sets of property which were not part of the whole heritage, and which passed on the basis of specific rules, exclusively intestate.

The essence of testamentary freedom is the ability of an individual who is competent to make a will to bequeath property which is freely disposable in his or her position as he or she sees fit. It is, of course, usual for his descendants or other next of kin to become his legal successors. The important question is to what extent such a custom and the social expectations associated with it are reflected in the legal order. The Roman law institute of '*heredes sui et necessarii*' found a certain reflection in Bohemian law, which on the one hand required that the descendants be provided for with a certain share of the family property (the land law emphasised

the position of the sons in this respect, while the municipal law was based on the equality of the claims of descendants of both sexes), but on the other hand it did not prevent the father from transferring any part of his property to other persons (or bequeathing it, for example, to church institutions). Disinheritance was also known to both land and municipal law, but only the municipal law provided more detailed reasons. If an individual lived in a childless marriage, the municipal law also provided for the legal and testamentary irreducible share of the surviving partner.

Finally, it should be noted that the bequest of property was in many cases subject to the consent of a higher authority whose rights might have been affected or directly threatened by such a bequest. This was primarily true for the nobility, whose wills required the consent of the sovereign in every single case from the very beginning. Therefore, the land law gradually developed several ways for nobles to decide on their last affairs, but in a dissimulated way, not by the classic testament. In the royal cities, on the other hand, testamentary freedom was contained in the privileges granted to them in the fourteenth century by Charles IV. For the subjects, Koldín's 1579 book stated that they were not allowed to testate without the consent of their superiors, but in practice this restriction was by no means universally applied – in fact, in many manors, the lords had already waived their right to grant such consent during the Middle Ages. As for the other restriction announced by Koldín, that children could not make a last will without their parents' consent (Magdeburg law also restricted the analogous right of married women), here the motive of personal capacity to decide on the latter matters rather returns again.

The presented outline of the issue is based primarily on normative sources, so that in the future it is of course possible to supplement the knowledge by means of partial analyses of specific cases and documents. These can then be interpreted not only from a historical and legal perspective, but also provide valuable impulses, for example, for the study of historical anthropology or the history of everyday life. The afore-mentioned historical disciplines can then put testamentary inheritance law in a significantly different perspective and can describe its social dimension. Indeed, it can hardly be disputed that real testamentary practice was shaped not only by legal norms but also by social customs and standard expectations to which testators were subjected by their family and wider society. Last but not least, this text could become a starting point for a comparative study, since the question of the mutual influence and inspiration of Bohemian law not only in relation to German, but especially also to Polish or Hungarian law, seems to be of utmost importance and has been underestimated so far.

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LAST WILLS OF KRAKÓW UNIVERSITY PROFESSORS AND THE SCOPE OF TESTAMENTARY FREEDOM IN POLAND IN THE SIXTEENTH AND SEVENTEENTH CENTURIES[1]

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Abstract – The first part of the article outlines the legal regulations that defined the scope of testamentary freedom in the legal systems in Poland in the sixteenth and seventeenth centuries. The testamentary freedom experienced limitations. In land law, the possibility of disposing of immovable property and, later on, of encumbering it in favour of the Church was completely excluded. Restrictions aimed at securing immovable property for the family and blocking the acquisition of property by the Church were also known to municipal law. Local canon law copied the universal regulations that excluded the disposal of Church property. These were the general conditions under which professors of the Kraków University – most often clergymen coming from the bourgeoisie – wrote their wills. The second part presents a manuscript volume containing a large number of last wills of professors. The last wills entered in it were in fact collections of bequests, as they did not distribute immovable property or appoint heirs. In addition, the subject of disputes over testamentary succession before the rector's court of the University of Kraków in the sixteenth century is explored. The lawsuits mainly concerned the enforcement of debts by the executors. Numerous actions against the executors were also brought by creditors of the deceased.

1. Professors' wills: in search of the proper law

The wills of professors of the Kraków University in the early modern period have not yet been the subject of legal-historical research, although, naturally, they have been referred to as a reservoir of valuable information when drawing up biographies

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of professors of the Kraków University.[2] Meanwhile, the issue of testamentary inheritance leads to reflections on the interactivity of several legal orders in force in the Republic of Poland in the sixteenth and seventeenth centuries.

Note that one of the consequences of the principle of the personality of law was the problem of determining the applicable law and the competent court in the event of a dispute. In the early modern Republic, several basic orders of law were distinguishable: land law addressed to the nobility, urban law in several varieties applied by the bourgeoisie, rural law, canon law, and laws concerning specific ethnic or professional groups, such as Armenian law and mining law.[3] The guiding principle of *actor sequitur forum rei* suffered many vagaries, for example when it came to the location of property, the scene of a crime, or the victim of a crime.[4]

Special jurisdiction was exercised by the rector of the University of Kraków, and his court had jurisdiction over the students and professors of the university, as well as residents of university properties and persons interacting with the academical spheres such as printers and booksellers, and people renting out accommodation to students.[5] Let us note that this special jurisdiction intersected with other rules, stemming from the background of the people who made up the academic

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[2] By way of example, it is worth mentioning the biographies included in: W. Uruszczak (*ed.*), K. Ożóg *et al*. *Profesorowie Wydziału Prawa Uniwersytetu Jagiellońskiego* [*Professors of Faculty of Law of Jagiellonian University*], vol. 1: *1364-1780*, Kraków, 2015.

[3] W. Uruszczak, *Historia państwa i prawa polskiego (966-1795)* [*History of the Polish State and Law (966-1795)*], Warsaw, 2013, p. 121-127.

[4] M. Mikołajczyk, *Proces kryminalny w miastach Małopolski XVI-XVIII wieku* [*A Criminal Trial in Towns of the Lesser Poland Region between the 16th and 18th Centuries*] [Prace naukowe Uniwersytetu Śląskiego w Katowicach = Scientific Works of the University of Silesia in Katowice, 2979], Katowice, 2013, in particular chapter II. Zygfryd Rymaszewski pointed on the basis of church court records that the choice of court in the late fifteenth and early sixteenth centuries was very often at the discretion of the parties (*ius dispositivum*). Z. Rymaszewski, "Problem forum w sądach kościelnych późnośredniowiecznej Polski" ["The Issue of Forum in the Ecclesiastical Courts of Late Medieval Poland"], in: J. Malec and W. Uruszczak (*eds.*), *Parlamentaryzm i prawodawstwo przez wieki. Prace dedykowane Prof. Stanisławowi Płazie w siedemdziesiątą rocznicę urodzin* [*Parliamentarism and Legislation through the Centuries. Writings Dedicated to Prof. Stanisław Płaza on the Seventieth Anniversary of His Birth*], Kraków, 1999, p. 313.

[5] S. Estreicher, "Sądownictwo rektora krakowskiego w wiekach średnich" ["Judiciary of the Rector of Kraków in the Middle Ages"], *Rocznik Krakowski* [*Kraków Yearbook*] 4 (1900), p. 252, 255-257; A. Winiarz, "Sądownictwo rektora Uniwersytetu Krakowskiego w wiekach średnich" ["Judiciary of the Kraków University Rector in the Middle Ages"], in: *Księga pamiątkowa Uniwersytetu Lwowskiego ku uczczeniu pięćsetnej rocznicy fundacji Jagiellońskiej Uniwersytetu Krakowskiego* [*Memorial Book of the University of Lviv to Commemorate the 500th Anniversary of the Jagiellonian Foundation of the University of Kraków*], Lwów, 1900, p. 5-6, 14; J. Sondel, *Ze studiów nad prawem rzymskim w Polsce piastowskiej* [*A Study of Roman Law in Poland in the Piast Poland*], Warsaw, 1978, p. 87; Idem, "Sądownictwo nad scholarami Akademii Krakowskiej" ["Jurisdiction over Students of the Kraków Academy"], in: D. Janicka and R. Łaszewski (*eds.*), *Historia integra. Księga Pamiątkowa ofiarowana Prof. Stanisławowi Salmonowiczowi w siedemdziesięciolecie urodzin* [*Historia integra. Memorial Book dedicated to Prof. Stanisław Salmonowicz on the Seventieth Anniversary of his Birth*], Toruń, 2001, p. 253-255, 257-259, 262-263, 256-266, 268; D. Machaj, "Sądownictwo rektorów krakowskich w XVI wieku" ["Judiciary of Kraków Rectors of the 16th Century"], *Czasopismo Prawno-Historyczne* [*Legal and Historical Journal*] 66/1 (2014), p. 43-44, 51-52.

community. Usually, professors belonged to the clerical state and entered the university as burghers, much less frequently as nobles, and exceptionally as peasants.[6] In the event of any legal dispute, it was necessary to establish the correct law and the correct court in order to continue with proceedings. In the context of a testamentary succession, the law's jurisdiction was of considerable importance, as different legal orders were characterized by different regulations.

This article is an overview of a subject that requires more extensive research and a broader monographic study. It consists of two parts. The first outlines the legal regulations defining the scope of testamentary freedom. The second part presents the book of last wills of professors at Kraków University and the contents of a seventeenth-century example of a professorial last will. In addition, the subject of disputes over testamentary succession before the rector's court of the University of Kraków in the sixteenth century is explored.

2. Scope of testamentary freedom

a. Land law

The principle of testamentary freedom, promoted since the Middle Ages by the Roman Catholic Church in the Kingdom of Poland, suffered considerable restrictions. In the clash between testamentary freedom and the protection of the interests of the immediate family, the latter often won out. In land law, the constitution of the Polish Sejm of 1505, re-enacted in 1510, proved fundamental.[7] According to this constitution, the disposition of immovable goods in a will was completely prohibited. Even before that, the appointment of an heir to the estate was not obligatory in the last wills of the nobility. After 1505, this had even become impossible, and the last will was primarily a collection of bequests and instructions (the so-called Germanic will). The mention of legal heirs in it was a conventional element, an expression of the testator's care for the family. If a person belonging to the closest heirs was passed over in silence, the question arose as to whether he or she had been disinherited. Disinheritance required a precisely defined basis. As a hypothesis that

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[6] Jan of Reguły was an example of a professor who combined noble origins with citizenship of the city of Kraków, and owned property subject to city law and land law. U. Sowina and K. Pacuski, "Testamenty mieszczan krakowskich jako źródło do badań nad stronami rodzinnymi imigrantów w krakowskiej elicie władzy (Przykład Jana z Reguł na Mazowszu)" ["Wills of the Kraków Bourgeoisie as a Source for the Study of the Family Pages of Immigrants in the Kraków Power Elite (The Example of Jan of Regula in Mazovia)"], in: Z. Noga (*ed.*), *Elita władzy miasta Krakowa i jej związki z miastami Europy w średniowieczu i epoce nowożytnej (do połowy XVII wieku). Zbiór studiów* [*The Power Elite of the City of Kraków and its Relationship with the Cities of Europe in the Middle Ages and the Modern Age (up to the Mid-17th Century). A Collection of Studies*], Kraków, 2011, p. 433-446.

[7] P. Dąbkowski, *Prawo prywatne polskie* [*Polish Private Law*], vol. 2, Lviv, 1911, p. 71, 78; J. Mazurkiewicz, *Ustawy amortyzacyjne w dawnej Polsce* [*Depreciation Laws in Old Poland*] [Pamiętnik Historyczno-Prawny = Historical and Legal Journal II/2], Lviv, 1933, p. 31.

needs to be verified in further research, it can be assumed that Polish land law made use of the solutions of Roman law in this respect, as defined in Novella 115. This probably did not occur directly, but rather in reference to the Statutes of Lithuania (1529, 1566, 1588). In regulating testamentary succession, the Statutes frequently drew on Roman law. Thus, the First Statute referred partly to the Roman and the canon law textbook *Summa legum brevis, levis et utilis* by Raimundus Parthenopaeus from the beginning of the fourteenth century, while the Second and Third Statutes were directly referencing fragments from the *Corpus iuris civilis*.[8] Unlike Lithuanian law, Polish law was not effectively codified in the sixteenth century. The so-called Correction of Laws of 1532 was rejected by the Sejm in 1534 for mainly non-meritorious reasons (lack of willingness of the nobility to reform the law, novelty of the code),[9] and subsequent codification efforts came to nothing.[10] This meant that especially the Third Statute of Lithuania enjoyed distinct attention in the Kingdom of Poland and could be a subsidiary source of law.[11]

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[8] J. Bardach, "Geneza romanizacji II Statutu Litewskiego" ["Genesis of the Romanisation of the Second Statute of Lithuania"], in: J. Malec and W. Uruszczak (*eds*.), *Dawne prawo i myśl prawnicza (Prace historyczno-prawne poświecone pamięci Wojciecha Marii Bartla)* [*Historical and Legal Writings Dedicated to the Memory of Wojciech Maria Bartel*], Kraków, 1995, p. 204-205; Idem, "Statuty litewskie – pomniki prawa doby Odrodzenia" ["Statutes of Lithuania – Monuments to the Law of the Renaissance Era"], in: *Dzieje kodyfikacji prawa. Materiały na konferencję historyków prawa w Karpaczu* [*History of the Codification of Law. Contributions for the Conference of Legal Historians in Karpacz*], Poznań, 1974, p. 43-71; S. Godek, "Elementy romanistyczne w III Statucie litewskim (1588)" ["Romanistic Elements in the Third Statute of Lithuania (1588)"], in: A. Lityński and P. Fiedorczyk (*eds*.), *Wielokulturowość polskiego pogranicza. Ludzie – idee – prawo* [*Multiculturalism of the Polish Borderland. People – Ideas – Law*], Białystok, 2003, p. 140-143; Idem, *Elementy prawa rzymskiego w III Statucie litewskim (1588)* [*Elements of Roman Law in the Third Statute of Lithuania (1588)*], Warsaw, 2004, chapter III; M. Mikuła, "Wpływ 'Summa utriusque iuris' mistrza Rajmunda na regulację dziedziczenia testamentowego w Statucie litewskim I z 1529 roku" ["The influence of Master Raymundus' 'Summa utriusque iuris' on the Regulation of Testamentary Succession in the Statute of Lithuania I of 1529"], *Czasopismo Prawno-Historyczne* [*Legal and Historical Journal*] 60/2 (2008), p. 57-86.

[9] W. Uruszczak, "Próba kodyfikacji prawa polskiego w okresie Odrodzenia. 'Korektura praw' z 1532 roku" ["An Attempt to Codify Polish Law during the Renaissance. The 'Correction of Rights' of 1532"], in: *Dzieje kodyfikacji prawa. Materiały na konferencję historyków prawa w Karpaczu* [*History of the Codification of Law. Contributions for the Conference of Legal Historians in Karpacz*], Poznań, 1974, p. 90; Idem, *Próba kodyfikacji prawa polskiego w pierwszej połowie XVI wieku. Korektura praw z 1532 r.* [*An Attempt to Codify Polish Law in the First Half of 16th Century. The 'Correction of Rights' of 1532*], Warsaw, 1979, p. 247-250.

[10] A. Moniuszko, "Projekty korektury ziemskiego prawa koronnego Jana Januszewskiego – polityczne uwarunkowania" ["Jan Januszewski's Projects for the Correction of Crown Land Law – Political Conditionings"], *Studia z Dziejów Państwa i Prawa Polskiego* [*Studies in the History of the State and Polish Law*] 16 (2013), p. 64.

[11] J. Bardach, "Statuty litewskie", p. 67-69; Idem, *Statuty litewskie a prawo rzymskie*, p. 91-93. The Polish-Lithuanian unions, including the Union of Lublin in 1569, did not lead to the unification of Crown (Polish) and Lithuanian law. A. Zakrzewski, *Wielkie Księstwo Litewskie (XVI-XVIII w.). Prawo – ustrój – społeczeństwo* [*The Grand Duchy of Lithuania (16th-18th centuries). Law – Political System – Society*], Warsaw, 2013, p. 221-222.

Restrictions on the disposal of immovable goods in a last will were undoubtedly linked to the desire to block the outflow of family property to the Church. The culmination of parliamentary legislation in this regard was the constitution of 1676, which prohibited the encumbrance of immovable goods with a redeemable annuity without the consent of the Sejm.[12] The law applied to both landed and urban immovable goods. The practice of establishing a redeemable annuity was very widespread. Encumbering an estate with an amount of money in favour of an ecclesiastical institution, in return for which the owner – *i.e.* the heir – was to pay an annuity of 7% of the value of the encumbrance (such a maximum ceiling was set in the Sejm's constitution of 1635), led to a significant depletion of the family's income. Of equal importance was the fact that depending on the type of the annuity – its termination occurred either in the event of a single payment of the lump sum of the encumbrance (a more severe option for the heir), or when the aggregated sum of annual payments reached the level of the amount of the encumbrance. Thus, as can be seen, parliamentary legislation in the sixteenth and seventeenth centuries led consistently to a restriction on the disposition and encumbrance of immovable goods in a last will.

b. Municipal law

While, as far as testamentary succession was concerned, the parliamentary constitutions had universal validity, the regulations in individual cities could differ. This was due to several reasons. The first is that from the thirteenth century onwards, towns in the Kingdom of Poland were set up under German law. It does not mean that *ius Teutonicum* was fully 'transferred' to new settled towns – there ware complex processes of selective adaptation of foreign solutions to local conditions and needs.[13] Four varieties of German law were applied on Polish territory: 1) the Magdeburg law; 2) the Środa law, which was a variant of the Magdeburg law and was applied in the thirteenth and fourteenth centuries in Silesia and Małopolska (Lesser Poland) until it was replaced in the fourteenth century by the Magdeburg law; 3) the Chełmno law in the central and northern part of the State in Mazovia, and in Pomerania (at first within the state of the Teutonic Order and after the recovery of Pomerania in 1466 within the borders of the Kingdom of Poland), and which was also derived from Magdeburg law; and 4) the Lübeck law in several towns in Pomerania.[14] The development of Chełmno law differed from that of Magdeburg law in Polish towns. A characteristic feature of towns which were subject to

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12 J. Mazurkiewicz, *Ustawy amortyzacyjne*, p. 36-37.

13 M. Mikuła, *Municipal Magdeburg Law (Ius municipale Magdeburgense) in Late Medieval Poland. A Study on the Evolution and Adaptation of Law* [Medieval Law and Its Practice, 30], Leiden, Boston, 2021, p. 233-237.

14 K. Kamińska, "Prawo średzkie jako instrument polityki osadniczej i gospodarczej w Polsce od XIII do początku XVI wieku" ["Środa Law as an Instrument of Settlement and Economic Policy in Poland from the 13th to the Beginning of the 16th Century"], in: D. Janicka and R. Łaszewski (*eds.*), *Historia integra. Księga pamiątkowa ofiarowana prof. Stanisławowi Salmonowiczowi w siedem-*

Chełmno law and Lübeck law was the presence of uniform *wilkierz* (*Willkür* in German) – sets of municipal statutes applicable in particular towns.[15] They were an important source of law in addition to the projects of codification of Chełmno law in the sixteenth century, also known as 'revisions' of the Chełmno law (1552-1554, 1566, 1580, 1594).[16] Meanwhile, the codification process in towns functioning under Magdeburg law was unsuccessful. It is worth noting, however, that resolutions on testamentary succession adopted by city councils were not infrequently based on a uniform model – the statutes of Kraków.[17] As the example coming from the capital, which at the same time was the mother city for numerous towns of the Kingdom (*i.e.* the city from which legal models were naturally to be drawn),[18] the Kraków legislation enjoyed high recognition and authority. This process also concerned testamentary regulations since Magdeburg law originally did not address the issue of testamentary succession. The Magdeburg Weichbild, the most important collection of Magdeburg law applied in the Kingdom of Poland, contained a provision on deathbed donation (*donatio post obitum* according to the findings of Adrian Schmidt-Recla),[19] limiting it to three *solidi*. Over time, this regulation began to be read in the context of testamentary succession,[20] which can be traced by observing

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dziesięciolecie urodzin [*Historia integra. Memorial Book dedicated to Professor Stanisław Salmonowicz on the Seventieth Anniversary of his Birth*], Toruń, 2001, p. 154, 157-158.

15 The term "*wilkierz*" was explained by Tadeusz Maciejewski, *inter alia*: *Zbiory wilkierzy w miastach państwa zakonnego do 1454 r. i Prus Królewskich lokowanych na prawie chełmińskim* [*Collections of Wilkierze in the Cities of the Teutonic Order State up to 1454 and of Royal Prussia settled under Chełmno Law*], Gdańsk, 1989, p. 14. Cf. W. Maisel, "Kodyfikacje prawa miejskiego w dawnej Polsce" ["Codifications of Municipal Law in Old Poland"], in: *Dzieje kodyfikacji prawa. Materiały na konferencję historyków prawa w Karpaczu* [*History of the Codification of Law. Contributions for the Conference of Legal Historians in Karpacz*], Poznań, 1974, p. 98-99.

16 Z. Zdrójkowski, *Zarys dziejów prawa chełmińskiego. 1233-1862* [*An Outline of the History of Chełmno Law. 1233-1862*], Toruń, 1983, p. 3; W. Carls, "Rechtsquellen Sächsisch–magdeburgischen Rechts" ["Sources of Law in Saxon-Magdeburg Law"], in: I. Bily, W. Carls and K. Gönczi (*eds.*), *Sächsisch–magdeburgisches Recht in Polen. Untersuchungen zur Geschichte des Rechts und seiner Sprache* [*Saxon-Magdeburg Law in Poland. Research on the History of Law and its Language*] [Ius Saxonico-Maideburgense in Oriente: das sächsisch-magdeburgische Recht als kulturelles Bindeglied zwischen den Rechtsordungen Ost- und Mitteleuropas = The Saxon-Magdeburg Law as Cultural Link between the Legal Systems of East- and Middle-Europe, 2], Berlin, 2011, p. 90, 96-97, 102-103.

17 M. Mikuła, "Statuty prawa spadkowego w miastach polskich prawa magdeburskiego (do końca XVI wieku)" ["Statutes of the Inheritance Law in Polish Cities Settled with the Magdeburg Law (Until the End of the 16th Century)"], *Z Dziejów Prawa* [*From the History of Law*] 7 (15) (2014), p. 33-63.

18 M. Mikuła, *Prawodawstwo króla i sejmu dla małopolskich miast królewskich (1386-1572). Studium z dziejów rządów prawa w Polsce* [*Royal and Parliamentary Legislation for the Towns of the Province of Lesser Poland (1386-1572). A Study of the History of the Rule of Law*], Kraków, 2014, p. 281-282.

19 A. Schmidt-Recla, *Kalte oder warme Hand? Verfügungen von Todes wegen im mittelalterlichen Referenzrechtsquellen* [*Cold or Warm Hand. Acts of Last Will in Medieval Legal Sources of Reference*] [Forschungen zur deutschen Rechtsgeschichte, 29], Cologne, Weimar, 2011, p. 84-88.

20 F. Ebel, "'Das spreke wy vor eyn recht…' Versuch uber das Recht der Magdeburger Schoppen ["Attempt on the Right of the Magdeburg Aldermen"], in: A. Fijal, H.-G. Leuchte and H.-J. Schiewer (*eds.*), *Unseren fruntlichen grus zuvor: Deutsches Recht des Mittelalters in mittel- und*

the change in the wording of the article's title from the German-language manuscript of the Kraków City Council of 1308, through the oldest surviving text in a Latin translation by Konrad of Sandomierz (the Sandomierz version of the Silesian-Małopolska Compilation, manuscript from 1359), and the Kraków version of the Silesian-Małopolska Compilation, to later Latin texts and official prints from 1506 and 1535. While donations are mentioned in the fourteenth-century texts, the fifteenth-century manuscript of the Kraków version includes the title *De testamentis*. Bequests were mentioned in the title of the article by Jan Łaski in the official print of 1506,[21] while the new Latin translation of 1535 included, in addition to the provision, a gloss containing an introduction to the regulation of last wills in Roman law.[22] The original lack of testamentary regulation in Magdeburg law was covered by municipal legislation.

The scope of the properties that were subject to testamentary freedom in Polish towns was changing. From as early as the mid-fourteenth century, increasing restrictions on the disposal of immovable goods to the Church can be observed. According to the privilege of King Casimir the Great (r. 1333-1370) of 1358, such a bequest of immovables was valid, but the goods did not ultimately become the property of the legatee.[23] After the death of the testator, the property had to be sold, and this amount went to the Church. A similar mechanism was in place in Lviv in light of the statute of 1444.[24] According to the Kraków statute of 1530, a disposition of immovable goods required the consent of relatives.[25] It is worth adding that in Poznań, according to Krystyna Bukowska's research, the freedom to dispose of property in a will was also limited by the rights of the family.[26] The afore-mentioned regulations protected the interests of the family and, moreover, ensured that city plots did not pass to ecclesiastical institutions through acts of last will. Nonetheless, they left more room for testamentary freedom than the Sejm legislation.

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osteuropäischen Raum. Kleine Schriften [*German Law of the Middle Ages in Central and Eastern Europe. Small Writings*], Cologne, 2004, p. 477-478.

21 A comparison of the Latin provisions of the Weichbild of the Silesian-Małopolska arrangement is provided by the database "IURA. Sources of Law from the Past". Transcription of manuscripts Maciej Mikuła. www.iura.uj.edu.pl/dlibra/publication/502#structure, accessed 4 May 2023.

22 M. Jaskier (*ed.*), *Iuris Municipalis Maideburgensis Liber vulgo Weichbild nuncupatus…*, Kraków, 1535, art. LXV.

23 F. Piekosiński (*ed.*), *Kodeks dyplomatyczny miasta Krakowa* [*Diplomatic Codex of the City of Kraków*], vol. 1, Kraków, 1885, no. 32.

24 *Akta grodzkie i ziemskie z czasów Rzeczypospolitej Polskiej z archiwum tak zwanego bernardyńskiego we Lwowie wskutek fundacyi śp. Alexandra hr. Stadnickiego* [*Municipal and Land Records from the Times of the Republic of Poland from the so-called Bernardine Archives in Lviv as a Result of the Foundation of the Late Alexander Count Stadnicki*], vol. 5, Lviv, 1875, no. 104.

25 F. Piekosiński (*ed.*), *Prawa, przywileje i statuta miasta Krakowa (1507-1795)* [*Laws, Privileges and Statutes of the City of Kraków (1507-1795)*], vol. 1 *(1507-1586)*, Kraków, 1885, nr. 43.

26 K. Bukowska, *Orzecznictwo krakowskich sądów wyższych w sporach o nieruchomości miejskie (XVI-XVIII w.). Studium z historii prawa rzymskiego w Polsce* [*Jurisprudence of Kraków's Higher Courts in Disputes over Municipal Real Estate (16th-18th centuries). A Study in the History of Roman Law in Poland*], Warsaw, 1967, p. 98.

Not only the larger cities introduced testamentary regulations. Appropriate resolutions were also passed in smaller towns. It was decided in the mining town of Olkusz in 1483 that all dispositions in favour of the Church required the consent of the town council, and in the case of bequests, as in Kraków, the goods had to be sold and the church institution received the monetary equivalent.[27] The 1550 statutes of the town of Ciężkowice contained a ban on the disposal of immovable goods beyond the closest relatives.[28] The 1551 *laudum* of Myślenice stipulated that only movables could be bequeathed to church institutions.[29]

Although the direction of the solutions was common to both land law and municipal law – restricting the disposal of immovable goods – the detailed solutions differed significantly.

c. Particular canon law of the province of Gniezno[30]

As early as the thirteenth century, the Roman Catholic Church attempted to introduce in the kingdom of Poland the principle of testamentary freedom for lay persons.[31] As mentioned, it suffered a significant limitation under land and municipal law. Other regulations of particular canon law mainly concerned clerics. These regulations were the result of synodal legislation and were introduced in the collections of synodal statutes.

In 1420, the archbishop of Gniezno, Mikołaj Trąba (c. 1358-1422), successfully completed a uniform collection of particular canon law. It replaced Archbishop Jaroslaw's earlier, imperfect collection of 1357 called the *Synodic*.[32] The Trąba collection, called the Statutes of Wieluń and Kalisz, was systematised according to the division in the *Liber Extra*. In addition to the manuscript version, it is also preserved in a printed version of 1518. It was subsequently printed as *vetera iura* in 1523 in another collection of particular canon law by Archbishop Jan Łaski

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27 *Materiały do Kodeksu Dyplomatycznego Małopolski* [*Materials for the Lesser Poland Diplomatic Codex*], vol. 5, Kraków, www.kodeks.pau.krakow.pl/dokumenty.html, accessed 20 January 2023.

28 M. Mikuła, "O reformie prawa miejskiego w XVI wieku: ciężkowicka uchwała o prawie prywatnym i administracji" ["On the Reform of the Municipal Law in 16th century. Ciężkowice Resolution on Private Law and Administration"], *Krakowskie Studia z Historii Państwa i Prawa* [*Kraków Studies in the History of State and Law*] 6/3 (2013), p. 241-245.

29 J. W. Kutrzeba, *Myślenice. Notatki do historyi miasta Myślenic* [*Myślenice. Notes to the History of the City of Myślenice*], Kraków, 1900, p. 112.

30 The ecclesiastical province of Gniezno included *inter alia* the diocese of Kraków.

31 R. Dębska, "O testamencie w polskim prawie średniowiecznym" ["About a Will in Medieval Polish Law"], in: H. Olszewski (*ed.*), *Studia z historii ustroju i prawa. Księga dedykowana Profesorowi Jerzemu Walachowiczowi* [*Studies on the History of the Political System and Law. A Book Dedicated to Professor Jerzy Walachowicz*], Poznań, 2002, p. 59-60; P. Dąbkowski, *Prawo prywatne polskie*, p. 78.

32 For a summary of basic information on synodal statutes see S. Kutrzeba, *Historia źródeł dawnego prawa polskiego* [*History of the Sources of Old Polish Law*], vol. 2, Lviv, Warsaw, Kraków, [1926], p. 104-119.

(1456-1531). Previously issued regulations were also to be found in Archbishop Stanisław Karnkowski's (1520-1603) private collection of 1579 on testamentary legislation.[33]

Testamentary inheritance was also the subject of various seventeenth-century statutes. In 1621, significant regulations were enacted at the Piotrków synod under Archbishop Wawrzyniec Gembicki (1559-1624). They extended the earlier ones concerning the form of the will. In turn, in 1629, the 1628 statutes of the Piotrków synod were printed, also containing testamentary regulations. Neither synodal statute was included in Archbishop Jan Wężyk's (1575-1638) collection of 1628. Subsequent synodal legislation of the Gniezno Province (the Warsaw synods of 1634 and 1643) no longer contained regulations on wills.

The Statutes of Mikołaj Trąba included several issues concerning the testamentary succession of the clergy. They were contained in Article 9 of Book III. It was forbidden to bequeath income from Church property to concubines and children *ex fornicacione geniti*.[34] In particular, this concerned the disposition of annual income from ecclesiastical goods after the death of the testator, from which payments could be made to the deceased's creditors and disposed of by way of bequests (*gratia anni*). Wills of clergymen were to be drawn up in front of two clerical witnesses or, in their absence, in front of two trustworthy persons.[35] Although this latter requirement did not directly concern the scope of freedom of inheritance, the additions to this provision in later synodal legislation will nevertheless prove relevant to this topic. An extensive section was devoted to the restrictions established in secular law on making pious bequests on one's deathbed. These restrictions were declared non-binding, and persons violating the will of the testator were to be excommunicated.[36] It is also worth mentioning the user notes that were found in manuscripts and in the 1518 printed edition. These usually summarized the provisions of the statutes, and their presence is evidence that these copies were, in fact, used in legal practice.[37]

The statutes, following universal canon law, forbade the disposition of Church property: immovable property, income, and selected movable property. (Article 6 of Book III of *De rebus ecclesiae non alienandis*).[38] Provisions concerning the testamentary succession of clergy must always be considered with these

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33 *Constitutiones Synodorum, Metropolitanae Ecclesiae Gnesnensis […] usque ad annum […] 1578*, Kraków, 1579, fol. 71v-73r: *De testamentis et vltimis voluntatibus, et Anno Gratiae. Ex Antiquis*.

34 J. Fijałek and A. Vetulani (*eds.*), *Statuty synodalne wieluńsko-kaliskie Mikołaja Trąby z r. 1420*, z materiałów przysposobionych przez B. Ulanowskiego [*Mikołaj Trąba's Synodal Statutes of Wieluń and Kalisz of 1420, from B. Ulanowski's Materials*], Kraków, 1951, p. 54.

35 *Ibidem*, p. 55.

36 *Ibidem*, p. 55-56.

37 *Ibidem*, p. 167-169.

38 This prohibition already appeared in the statutes of Legate Philip of Ferno of 1279, issued for the Kingdom of Poland and the Kingdom of Hungary (K. Kolańczyk, *Studia nad reliktami wspólnej własności ziemi w najdawniejszej Polsce* [*Studies on Relics of Common Land Ownership in Early Medieval Poland*], Poznán, 1950, p. 68).

general prohibitions in mind. Let us note that professors of the Faculty of Law of the Kraków University were also authors of writings devoted to testamentary succession. Worth mentioning among them is Jan Dionysius Politowicz, who came from a bourgeois family (ca. 1609-1671).[39] His *Quaestio de testamentis clericorum* refers to the prohibition on the disposal of Church property by the clergy.[40] The latter had authority only to act as administrators of this property.

Subsequent testamentary regulations in the synodal statutes either complemented or reformulated provisions from Mikołaj Trąba's Wieluń and Kalisz statutes. Worth mentioning are the Gniezno statutes of 1621 and the Piotrków statutes of 1628.

The 1621 statutes of the Synod of Gniezno dealt explicitly with the last wills of clergy.[41] They confirmed the general right to draw up wills in front of witnesses, but emphasized that they could only concern movable property and monetary sums, not immovable property. The regulation mainly concerned the form of making a will, but it is nevertheless worth mentioning because it was distinguished by the subject matter of the disposition. If the last will contained only pious legacies (*pia legata*), two clerics were required as witnesses. If it was not possible to summon clerics, two lay persons (*probi viri*) were required. This was in accordance with the statutes of Mikołaj Trąba. If the last will did not concern a pious bequest, a parish priest and two witnesses were required, or four witnesses in the absence of a parish priest. The last will was to be signed by the testator's own hand and by the witnesses. A procedure was also provided for if the witnesses were insufficiently literate to sign. The following passage from the statutes is significant: *Et sic celebrata ultima voluntas, erit firma et valida, etiam sine institutione haeredis, et absque aliis solennitatibus de jure requisitis*.[42] This is an obvious confirmation that the will was considered as a collection of bequests, and that the appointment of an heir was optional.

The 1628 Statutes of Piotrków by Jan Wężyk confirmed the general principle of freedom of disposal of one's own property: *Quamvis autem et consuetudine antiqua, et statutis Provincialibus, liberum sit Clericis hujus Provinciae disponere ac testari de suo peculio*.[43] The clarification regarding one's own property is

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39 K. Fokt, "Politowicz (Politowic) Jan Dionizy (ur. ok. 1609 r., zm. 11 III 1671 r.)" [Politowicz (Politowic) Jan Dionizy (b. c. 1609, d. 11 March 1671)], in: W. Uruszczak (*ed.*), K. Ożóg *et al*., *Profesorowie Wydziału Prawa Uniwersytetu Jagiellońskiego* [*Professors of Faculty of Law of Jagiellonian University*], vol. 1: *1364-1780*, Kraków, 2015, p. 349-351.

40 J. D. Politowicz,, K. Sorka (*transscr.*), *Qvæstio De Testamentis Clericorum*, Kraków, 1648, in: "IURA. Sources of Law from the Past", www.iura.uj.edu.pl/dlibra/publication/2809/edition/2100/content?ref=struct, accessed 10 April 2023.

41 *Synodus Provincialis Gnesnensis provinciae sub […] D. Laurentio Gembicki, […] Petricouiae Anno Domini, Millesimo Sexcentesimo Vigesimo primo. Die vigesima sexta, Mensis Iuly celebrate*, Kraków, 1624, fol. F2r, F2v: *De Testamentis, et eorum forma.*

42 *Synodus Provincialis Gnesnensis sub […] D. Laurentio Gembicki*, fol. F[3]r.

43 *Synodus Provincialis Gnesnensis provinciae sub […] D. Joanne Węzyk, […] Petricouiae Anno Domini, Millesimo Sexcentesimo Vigesimo octavo. Die vigesima secunda, Mensis May celebrata*, Kraków, 1629, fol. H[4]v: *De rebus post obit[u]m Clericorum relictis.*

important. The prohibition on clerics making bequests in favour of concubines and natural children was also confirmed. Such bequests were invalid, and the property mentioned in them was forfeited to the Church: *Si quis secus fecerit, legatum non teneat, et quod ita relictum est cedat Ecclesiae, cui vivus servivit*.[44] It was also noted that the taking of Church property after the death of a clergyman was punishable by excommunication *latae sententiae*.

d. University regulation of 1724

The literature has indicated that the court of the rector of the University of Kraków (and generally Kraków University courts) should apply Roman law.[45] This general formulation, however, requires a verification and further research. It is highly improbable that concrete regulations of Roman law would be applied in the field of testamentary succession, if it would mean excluding the applicable regulations in existing land law, municipal law, or canon law (universal and particular). Moreover, one can point to internal university regulations that introduced further detailed rules for the disposition of property by members of the academic community.

In a nutshell, the material basis for the functioning of the university was provided by foundations. By analogy with other ecclesiastical benefices, general prohibitions on the disposal of Church property applied to these estates. Irregularities must have occurred, however, since testamentary succession became the subject of regulation in the university statutes. On 22 March 1724, under the rectorship of Martin Waleszyński (1669-1739), the statutes were enacted.[46] The provision mentioned that people from outside the University were appointed as executors of wills, in which a threat to the powers of the University was perceived. Meanwhile, professors were obliged by their oath to defend the interests of the University. It was therefore decreed that at least one of the executors should be appointed from among the professors of the University, and the rest according to the will of the testator. Significantly, immediately (*statim*) after the death of the testator, the executors were

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44 *Ibidem*.

45 J. Sondel, "Nauczanie uniwersyteckie w świetle przywileju fundacyjnego Kazimierza Wielkiego" ["The University Teaching viewed in the Light of Casimir the reat's Founding Privilege"], in: W. Uruszczak and D. Malec (*eds*.), *Krakowskie studia z historii państwa i prawa* [*Kraków Studies in the History of State and Law*], vol. 2, Kraków, 2008, p. 57-58; Idem, "Sądownictwo nad scholarami", p. 260-261, 269; S. Godek, "Prawo rzymskie w Polsce przedrozbiorowej w świetle aktualnych badań" ["Roman Law in pre-Partition Poland in the Light of Current Research"], *Zeszyty Prawnicze* 13/3 (2013), p. 50-52. Stanisław Estreicher stressed that the court proceedings were based on canon law, although he also noted the direct reference in the rector's decision to Justinian's *Digesta* (S. Estreicher, "Sądownictwo rektora krakowskiego", p. 260). Alojzy Winiarz also mentioned about proceedings based on canon law. A. Winiarz, "Sądownictwo rektora Uniwersytetu Krakowskiego", p. 20.

46 J. Szujski (*ed*.), "Statuta Uniwersytetu Krakowskiego" ["Statutes of Kraków University"], in: *Archiwum do Dziejów Literatury i Oświaty w Polsce* [*Archive for the History of Literature and Education in Poland*], vol. 2, Kraków, 1882. In "IURA. Sources of Law from the Past" database: www.iura.uj.edu.pl/dlibra/publication/3960/edition/3156/content?ref=struct, accessed 30 April 2023.

obliged to submit the will to the rector for approval (*Qui executores statim post obitum testatoris approbationem testamenti per Magnificum D[omi]num Rectorem procurent*). They were also required, within one year and six weeks, to report on the income and expenditure of the estate, as well as on the costs of executing the will. Note that although the provision concerned the duties of the executors, it nevertheless encroached on testamentary freedom. It limited the testator's freedom to choose the executors of a will, and the obligation to present the will to the rector for approval had a controlling function.

3. Freedom of wills in practice

From the discussion so far, the extent of a university professor's testamentary freedom was not a matter of course. It was important what components were part of the testator's estate – in particular what properties belonged to the testator's own estate, whether immovable properties were located in the city, and whether they belonged to estates subject to land law. The use of specific solutions was linked to the social background of the professor, *i.e.* whether he was noble, burgher, or peasant. In light of the findings to date, professors' wills were to be primarily collections of bequests. They could not concern landed estates or Church property. After 1676, they could not contain pious bequests, which would have consisted of annuities on immovable property. The disposition of ecclesiastical property – immovable property, rights, and ecclesiastical property *extra commercium* – remained beyond the purview of the discussion. The application of testamentary law by professors requires further intensive study; nevertheless, it is already worth noting from the survey that these general requirements were followed. The research sample is a selection of wills entered in the university book *Liber testamentorum*, as well as a set of sixteenth-century records of the rector's court, allowing us to identify the types of testamentary succession cases.

Preserved as inventory number 36 in the Jagiellonian University Archives, the book of wills of Kraków University professors began to be kept in 1647,[47] the last entry being that of Stanisław Filipowicz from 1760. However, it also contains earlier wills, starting with the oldest one from 1607 of Jakub Janidło (1570-1619), who was a Doctor of Law and long-time rector of the University. There are 49 entries in total. Naturally, these are not all the wills made by professors of the University in the seventeenth and first half of the eighteenth century, but only a portion of them. Not all of them are full wills. The book contains the royal approval of the foundation of Gabriel Prowancius Władysławski (he founded a college for students, which now houses the *Collegium Medicum*), and an excerpt of the will, and there are also court documents from a trial over bequests. With regard to the last wills,

[47] Full title: *Liber Testamentorum et ordinationum post Defunctos Admodum Reuerendos ac Clarissimos D. Professores Academiae Cracoviensis Jnchoatus In Anno Domini 1647*.

the largest number (twenty-four) are those of theologians, another twelve are wills of lawyers, and only one was drawn up by a Doctor of Medicine. The vast majority of seventeenth-century testators mentioned in the book were burghers. The exceptions are: Doctor of Theology Adam Draski of Błażowa, who was of peasant origin (d. 4 December 1648),[48] and the nobleman Stanisław Ossędowski of the Lis coat of arms, who was a lawyer and canon of Kraków (d. after 5 March 1669).[49] The wills were written principally in Latin, but there are also some dispositions whose fragments are partly in Polish and partly in Latin. Only one will, from 1729, was written completely in Polish (that of Franciszek Żabicki, a philosopher). The wills abound in detailed entries, often providing a precise inventory of the estate.

The layout of the content is not surprising. There is an obligatory clause that the testator disposed of the estate in full mental capacity. The last wills contain extensive reflections on the mortal nature of man, typical of the Baroque *ars moriendi*. There is no shortage of decisions concerning funeral ceremonies and the obligatory appointment of the executors of the will. An example is the extensive disposition of the last will of Wawrzyniec Śmieszkowic (1590-1646), a Doctor of Medicine from a bourgeois family from Brzeziny, dated 15 May 1646.[50] A brief intitulation is followed by a mental health clause, and the document later takes up further reflections on the transience of life, as well as a confession of faith. Detailed instructions for the funeral and grave epitaph were supplemented by instructions for Mass to be said for the salvation of the soul of the deceased. The inventory of the estate was divided into several categories, including encumbrances of immovable goods (disposal of which was still permitted at the date of this last will), money, movable property, receivables, vestments, and books. To various women, he allocated *suppelectilia domestica* – items used in the household. It is possible that the application of municipal law, according to which household objects (*suppelectilia*) were inherited by female relatives, may be visible here. The foundation of a dormitory for poor students was regulated in detail. Śmieszkowic named four executors and set out the precise order in which the bequests were to be paid: alms for the poor on the day of the funeral; foundations and bequests for church institutions on

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48 "Adam Jacek Draski z Błażowej (lub z Błażowa – raczej z Błażowej, bo ona leży w sąsiedztwie Tyczyna) i z Tyczyna, syn Jana" ["Adam Jacek Draski of Błażowa (or from Błażów – rather, from Błażowa, as it lies in the neighbourhood of Tyczyn) and from Tyczyn, son of Jan"] (Id: 2009152), in: *Corpus Academicum Cracoviense (CAC)*, online database in Jagiellonian University Archives, www.cac.historia.uj.edu.pl/osoba/2009152_Adam_Jacek_Draski_z_B%C5%82a%C5%BCowej_lub_z_B%C5%82a%C5%BCowa_raczej_z_B%C5%82a%C5%BCowej_bo_ona_le%C5%BCy_w_s%C4%85siedztwie_Tyczyna_i_z_Tyczyna_syn_Jana, accessed 11 April 2023.

49 K. Fokt, "Ossędowski (Ossendowski) Stanisław h. Lis (zm. po 5 III 1669 r.)" ["Ossędowski (Ossendowski) Stanislaw of Lis coat of arms (d. after 5 March 1669)"], in: W. Uruszczak (*ed.*), K. Ożóg *et al*., *Profesorowie Wydziału Prawa Uniwersytetu Jagiellońskiego* [*Professors of Faculty of Law of Jagiellonian University*], vol. 1: *1364-1780*, Kraków, 2015, p. 321-322.

50 Kraków, Jagiellonian University Archives (henceforth: KJUA), no. 36 (*Liber Testamentorum*), p. 1-29; M. Baster, "Wawrzyniec Śmieszkowic (1590-1646)", in: *Polski Słownik Biograficzny* [*The Polish Biographical Dictionary*], vol. 51, 2016, p. 85-87".

the following day; and bequests to the family on the third day. He made the largest bequest to his nephew, an amount of 1,000 florins, subject to the condition '*si honeste se gerit et vult esse frugi*'. There is a note in the book stating that the will was declared to be in accordance with the laws and customs of the university (*iuxta iura et consuetudines nostrae universitatis*). The entry in the book of wills thus had the function of verifying the legality of the last will; information about the rector's approval of the will also appears with other last wills.[51] In all last wills in the book, the rule is that there is no disposition of immovable property, and no appointment of an heir, but a focus on bequests.

It is also worth looking at the marginal glosses that were introduced in the book next to the main text of the last wills. For example, Adam Opatowczyk (1557-1647), a professor of theology and a canon of Kraków, wrote his first will in 1635. Six years later he supplemented this disposition with further bequests, which he referred to collectively as *Codicilli testamentarii*. In detailed dispositions, he decided on the allocation of canonical robes to three clergymen, and to a fourth person who was mentioned only generally as *successor*. In the margin, a hand different from the beautiful calligraphed entry of Opatowczyk's last will, indicated that one of the items was due to an heir – by implication, a relative. Note that the indication of a successor *ab intestato* here is an exception among the considerable number of bequests dedicated to persons who are not family of the testator. The second note indicates the foundation of a rent on a tenement for the use of students from Iwańsk and Opatów. A marginal note is also encountered in other cases. The appointment of a new executor due to the death of the original appointee is indicated by a note next to the will of Doctor of Theology Adam Draski in 1648.[52]

The marginal notes devoted to executors indicate the stage of execution of the last will. As it turns out, numerous cases in the context of testamentary succession were dealt with by the rector's court, and executors were key figures in these processes. Based on the rector's records, three main categories of cases can be distinguished. The first consisted of cases against the testator's debtors. The collection of debts was one of the executors' ungrateful tasks. For example, one defendant was a student, Walenty Lipski, who resided in the Bursary of Philosophers. The issue was the return of the books of the deceased Stanisław Rudnicki, who was parson in Słomniki and Giebułtów. The student eventually returned the books.[53] The second category included cases against executors brought by creditors of the deceased. The payment of inheritance debts was often one of the most difficult tasks of the executors. Therefore there are cases in which the persons sued by the heirs

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51 Testament of Mateusz Kraśnicki of Kraśnik. KJUA, no. 36, p. 80.

52 KJUA, no. 36, p. 54, a note on the change of executor also at the will of the doctor of theology and Kraków canon Paul Herc of 1658, and p. 82.

53 S. Estreicher (*ed.*), *Acta Rectoralia Almae Universitatis Studii Cracoviensis tomus secundus continens annos 1536-1580*, Kraków, 1909, no. 226 (22 December 1542).

denied having been appointed executors, which they succeeded in proving.[54] The third large group of records of the rector's court consists of receipts of bequests executed by the executors, payment of debts, collection of debts, and also procedural records (setting a deadline for the taking of evidence from witnesses, the result of the evidence taken, or the loss of the case due to the plaintiff's failure to appear at the first deadline). In the reviewed records from the sixteenth century, no case was encountered in which the validity of the last will itself was called into question.

4. Conclusions

The scope of testamentary freedom in the legal systems in Poland in the sixteenth and seventeenth centuries experienced limitations. In land law, the possibility of disposing of immovable property and, later on, of encumbering it in favour of the Church was completely excluded. Restrictions aimed at securing immovable property for the family and blocking the acquisition of property by the Church were also known to municipal law. Local canon law copied the universal regulations that excluded the disposal of Church property. Medieval ecclesiastical legislation in Poland, re-enacted in the modern period, imposed restrictions on the disposition of annual income from Church property, and opposed limits on the maximum amount of pious bequests. University legislation dealt only marginally with testamentary succession; moreover, it is relatively recent, dating from the first half of the eighteenth century. These are the general conditions under which professors of the Kraków University – most often clergymen coming from the bourgeoisie – wrote their wills. It appears that a means of verifying the legality of dispositions was to enter the will in the university's book of wills after the death of the testator. Explicit confirmations of legality are found in the *Liber testamentorum*. The wills entered in it were in fact collections of bequests, they did not distribute immovable property or appoint heirs. At this stage of the research, no lawsuits for the invalidity of the wills of university professors have been found in the rector's court. The lawsuits mainly concerned the enforcement of debts by the executors. Numerous actions against the executors were also brought by creditors of the deceased. Undoubtedly, further studies, taking into account sources of legal practice of non-university provenance, will reveal more details about the legal practice of testamentary succession of university professors. It will make it possible to determine the outcome of disputes conducted on the grounds of testamentary succession before courts other than that of the rector of the Kraków University.

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[54] Notes of 23 March 1579 and 20 March 1579. My thanks to Prof. Maciej Zdanek for making the reading of the manuscript available.

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INDEX

This index contains all names of persons and places mentioned in this volume. Due to the lack of consistent naming and often incomplete information in the original sources, the inclusion of persons was a complex process in which some creativity was required. Thus, a composite lemma 'Czarny, Agnieszka, daughter of Barbara, widow of Mateusz' should be read as Agnieszka, (who is the) daughter of Barbara, (who in turn is the) widow of Mateusz Czarny.

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